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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

S.S. "NANCY LYKES", her engines, boilers, etc., and LYKES BROS. STEAMSHIP COMPANY, INC.,

Petitioner,

—against—

GENERAL ELECTRIC COMPANY, INTERNATIONAL SALES DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF LYKES BROS. STEAMSHIP COMPANY, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Is an ocean carrier entitled "in any event" to the benefit of the package limitation set forth in the United States Carriage of Goods by Sea Act of 1936 (hereinafter COGSA), 46 U.S.C. § 1304(5), when the shipper fails to declare the value of the goods?

2) Did the courts below err as a matter of law in holding that an ocean carrier deviated unreasonably in violation of COGSA in choosing a transoceanic route that exposed its vessel to a one (1) or two (2) percent greater risk of encountering adverse weather conditions?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

A. THE DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND AND SEVENTH CIRCUITS ARE SQUARELY IN CONFLICT ON THE ISSUE OF THE APPLICABILITY OF THE PACKAGE LIMITATION FOLLOWING THE FINDING OF AN UNREASONABLE GEOGRAPHICAL DEVIATION 7

B. THE COURT OF APPEALS FOR THE SECOND CIRCUIT DID NOT APPLY THE ANALYSIS MANDATED BY THIS COURT IN INTERPRETING A STATUTE 13

C. AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT IS RAISED BECAUSE THE APPELLATE COURT'S RATIONALE FOR DEPRIVING THE CARRIER OF THE PACKAGE LIMITATION IS WRONG AND CONTRARY TO THE PURPOSE OF THE STATUTE (COGSA) 16

PAGE

D. THE FINDING OF AN UNREASONABLE DEVIATION IN THE CIRCUMSTANCES POINTS UP THE NEED FOR GUIDELINES FROM THIS COURT, INVOLVING AS IT DOES THE INTERPRETATION OF A FEDERAL STATUTE WHICH GOVERNS ALL OCEAN BILLS OF LADING TO OR FROM A PORT OF THE UNITED STATES 20

CONCLUSION 24

APPENDIX A

Decision of the Court of Appeals for the Second Circuit dated April 20, 1983 ..... A-1

APPENDIX B

Decision of the District Court for the Southern District of New York dated April 15, 1982 ..... B-1

APPENDIX C

Judgment of the District Court for the Southern District of New York entered August 13, 1982 ... C-1

APPENDIX D

Text of the United States Carriage of Goods by Sea Act of 1936; 46 U.S.C. 1300 *et seq.* D-1

APPENDIX E

Excerpts from the Trial Record E-1

TABLE OF AUTHORITIES

Cases: PAGE

Atlantic Mutual Insurance Company v. *Poseidon Schiffahrt*, 313 F.2d 872 (7th Cir.), *cert. denied* 375 U.S. 819 (1963) 8, 9, 10, 11, 12

Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 15

Du Pont de Nemours International S.A. v. *S.S. MORMACVEGA*, 493 F.2d 97 (2d Cir. 1974) 11

The EDMUND FANNING, 201 F.2d 281 (2d Cir. 1953) 18

Encyclopaedia Britannica, Inc. v. *S.S. HONG KONG PRODUCER*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970) 10, 11, 12

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 13

The FREDERICK LUCKENBACH, 15 F.2d 241 (S.D.N.Y. 1926) 23

General Electric Company International Sales Division v. *S.S. "NANCY LYKES,"* 706 F.2d 80 (2d Cir. 1983) 8, 17, 18, 19, 21

Iligan Integrated Steel Mills, Inc. v. *S.S. JOHN WEYERHAEUSER*, 507 F.2d 68 (2d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) 12, 16, 17, 18, 19

Jones v. *The FLYING CLIPPER*, 116 F.Supp. 386 (S.D.N.Y. 1953) 9, 10, 11, 12, 17

Mitsui & Co. v. *American Export Lines, Inc.*, 636 F.2d 807 (2d Cir. 1981) 18

Nemeth v. *General Steamship Corp.*, 694 F.2d 609 (9th Cir. 1982) 11, 12, 19

Nichimen Company v. *M.V. FARLAND*, 462 F.2d 319 (2d Cir. 1972) 18

PAGE

Packard Motor Car Co. v. *NLRB*, 330 U.S. 485 (1947) 13

Philippine National Bank et al. v. *Lykes Bros., et al.*, 1938 AMC 141 (E.D.N.Y. 1937) 4

Singapore Navigation Co. S.A. v. *Mego Corp.*, 540 F.2d 39 (2d Cir. 1976) 17, 19, 20

Spartus Corp. v. *S.S. YAFO*, 590 F.2d 1310 (5th Cir. 1979) 12

The Steamship STYRIA v. *Morgan*, 186 U.S. 1 (1901). 20, 22

St. Johns N.F. Shipping Corp. v. *S.A. Companhia Geral Commercial Do Rio de Janeiro*, 263 U.S. 119 (1923) 7

United States v. *Oregon*, 366 U.S. 643 (1961) 13

United States v. *Turkette*, 452 U.S. 576 (1981) 14

The WAALHAVEN, 36 F.2d 706 (2d Cir. 1929), *cert. denied*, 281 U.S. 747 (1930) 22

The Willdomino v. *Citro Chemical Co.*, 272 U.S. 718 (1927) 7, 22

Statutes and Rules:

Federal Rules of Civil Procedure, Rule 9(h) 2

28 U.S.C. § 1254(1) 1

Carriage of Goods by Sea Act (COGSA):

46 U.S.C. § 1300 ..... 1, 4

46 U.S.C. § 1302 ..... 14, 18

46 U.S.C. § 1303(1)(2) 14, 16

46 U.S.C. § 1304(2) 12, 16

46 U.S.C. § 1304(4) 2, 8, 9, 11, 12, 13, 14

46 U.S.C. § 1304(5) 2, 8, 9, 10, 11, 12, 13, 14, 16, 18, 19

PAGE

Supreme Court Rule 17.1(a) 7

17.1(c) 13

Other Authorities:

H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936) ...7-8, 15

PETITION OF LYKES BROS. STEAMSHIP COMPANY, INC.* FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit dated April 20, 1983 affirming the district court's judgment is reported at 706 F.2d 80 and is set forth in Appendix "A".** The opinion of the United States District Court for the Southern District of New York dated April 15, 1982 entering judgment for respondent is reported at 536 F.Supp. 687 and is set forth in Appendix "B".

JURISDICTION

Petitioner seeks review of a decision of the court of appeals for the second circuit dated April 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

46 U.S.C. § 1300 *et seq.* (United States Carriage of Goods by Sea Act of 1936) is set forth in Appendix "D".

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* Petitioner Lykes Bros. Steamship Co., Inc. is presently owned by Interocean Steamship, a Florida corporation which, in turn, is owned by Lykes Bros. Inc., and three individuals: W.J. Amoss, Jr., Robert J. Brennan and Eugene F. McCormick. At the time of the cargo loss which is the subject of the litigation, Lykes Bros. Steamship Company was owned by LTV Corporation.

** References to material included in the Appendices will be referred to as "App." followed by the appropriate letter and page number.

STATEMENT OF THE CASE

On June 13, 1980, plaintiff-respondent General Electric Company International Sales Division (hereinafter General Electric or respondent) brought a claim *in rem* against the vessel the S.S. "NANCY LYKES" and *in personam* against defendant-petitioner Lykes Bros. Steamship Company (hereinafter Lykes or petitioner) in the United States District Court for the Southern District of New York, under the admiralty and maritime jurisdiction of that court pursuant to Rule 9(h) of the Federal Rules of Civil Procedure, seeking damages for the non-delivery of nine skids containing electric locomotive parts, a portion of which was lost overboard. The action was tried without a jury before the Honorable Morris E. Lasker on September 22, 24 and 28, 1981. In its decision dated April 15, 1982, that court found the NANCY LYKES committed an unreasonable geographical deviation because the route followed to the Far East "exposed the vessel to significantly greater risks of adverse weather [B-12]." In finding Lykes liable, the court denied the applicability of the package limitation provision of COGSA, 46 U.S.C. § 1304(5) (B-12). Judgment was entered on August 13, 1982.

Defendant-petitioner Lykes then appealed to the United States Court of Appeals for the Second Circuit. In an opinion dated April 20, 1983, the court of appeals affirmed the district court's decision.

This petition involves the interpretation of two provisions of COGSA, 46 U.S.C. § 1304(4) and 46 U.S.C. § 1304(5), pertinent parts of which are quoted below:

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Pro-*

vided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of Liability; valuation of cargo

(5) Neither the carrier nor the ship shall *in any event* be or become liable *for any loss* or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. [emphasis added]

Respondent General Electric entered into an arrangement with consignees to deliver in the Far East, over a period of time, approximately seventy-four (74) locomotive cabs manufactured by General Electric in the United States (App. E-16). During the course of the performance of this agreement, General Electric caused to be carried on a number of vessels, including the S.S. NANCY LYKES and other vessels owned by petitioner Lykes, a number of such cabs (App. E-16). At the time of the casualty giving rise to the law suit, which involves the loss overboard from the S.S. NANCY LYKES of two such cabs during adverse weather, the better part of forty (40) cabs had already been delivered (App. E-18). The cabs were carried on the open deck at shipper's risk (App. E-17; E-3; E-18) because of their size pursuant to an express agreement between Lykes and General Electric.[1]

The bill of lading pertaining to the shipment was prepared by an agent of General Electric, as had been done on all previous shipments aboard Lykes' vessels (App. E-18). Thus, General Electric was familiar with and had notice of the form

1 On the face of the bill of lading the following appears in block letters: LOADED ON DECK AT RISK OF THE GOODS. (App. E-3)

of the contract, including clauses which (a) permitted the vessel to call at any port for the purpose of bunkering (taking on fuel oil), (b) incorporated into the bill of lading the United States Carriage of Goods by Sea Act (COGSA) 1936, 46 U.S.C. § 1300 *et seq.*, and (c) set forth a $500 package limitation provision which operated in the absence of a declaration by the shipper of the value of the cargo.[2]

The trial testimony also established that General Electric obtained cargo insurance from a third party covering the shipments in suit and that, indeed, its cargo underwriter paid the claim (App. E-19; E-4; E-7). Having covered the risk, General Electric did not declare the value of the cargo on the bill of lading (App. E-3).

The S.S. NANCY LYKES departed New Orleans on April 17, 1978 with three such cabs properly secured on deck (App. E-5). The vessel then proceeded through the Panama Canal en route Japan via San Pedro, California, where it stopped for fuel on May 3, 1978 (App. E-20). The NANCY LYKES had previously stopped at San Pedro for bunkers (App. E-20) as had other vessels owned by Lykes (App. E-12). In fact, Lykes had utilized San Pedro as a bunkering port, at least on one occasion, back in 1937 (*Philippine Nat'l Bank v. Lykes*, 1938 AMC 141 (E.D.N.Y. 1937)) and had never been found to have committed an unreasonable geographical deviation because of a stop for bunkers. Moreover, during the six month period preceding the casualty, 923 other vessels called at the port of San Pedro, California for bunkers only (joint exhibits 12, 13; see, also, App. E-9, 10).

After bunkering, the vessel departed San Pedro on May 4, 1978 bound for Japan on a modified great circle course recommended by Weather Routing, Inc., a company specializing in ocean routing.[3] (App. E-23; E-14) The recommended

2 The full text of these clauses, numbered 3, 7 and 26 respectively, is set forth in Appendix E (App. E-1, 2).

3 The evidence at trial with respect to the customary route for a vessel embarking on a voyage from the Panama Canal to Japan, all of which evidence was introduced by General Electric, demonstrates that there is

route took the vessel slightly to the north of San Pedro (App. E-23). Moreover, as is apparent from an inspection of the North Pacific Pilot Chart for April, 1978, the great circle route from Panama to Japan passes close to the California coast (App. E-25). Unfortunately, at 0430 hours on May 5, 1978, between latitudes 34° and 35° North, two of the three cabs were lost overboard as a result of perilous weather encountered (App. E-23; E-21) and not because of any failure to have the cabs properly secured to the deck of the vessel (App. B-8).

The evidence received during the trial of this case, even when viewed most favorably to General Electric, indicates that the NANCY LYKES had a 5 to 6% chance of encountering gale-force winds after departure from San Pedro, according to the testimony given by General Electric's expert witness.[4]

On the other hand, according to the North Pacific Pilot Chart (App. E-25) for April, 1978, which, like the expert

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no one recognized route. The maritime expert, Captain Patterson, called by respondent, testified that he extracted several Panama to Kobe routes from the Hydrographic Office Publication #151, entitled "Distances Between Ports": The great circle route, showing a distance of 7,964 miles and then a combination coastal and great circle route via Los Angeles, showing a distance of 8,098 miles (App. E-6). Further, the North Pacific Pilot Chart for April 1978 showed a modified great circle route of 7,791 miles, Panama to Yokohama, Japan via San Francisco, and still another route of 8,089 miles from Panama to Yokohama via Honolulu (App. E-25). The route preferred by respondent's weather expert covered a distance of 8,589 miles, which route is not even shown on the pilot chart. Lastly, the actual track of the NANCY LYKES covered a distance of 8,464 miles or 125 miles less than the route preferred by respondent's weather expert (App. E-9). Thus, three of the five routes mentioned above place the vessel in close proximity to San Pedro, the port for Los Angeles, California.

4 The expert called by the shipowner stated that based on 100 years of weather records (App. E-15), the statistical chance of the NANCY LYKES encountering gale force winds in May in the area off the coast was 1% at 40° and a trifle under ½% at 30°. He then estimated the percentage at latitude 35°N to be less than 1%. (App. E-14) The expert called by General Electric based his probability testimony of 5 to 6% on his examination of records covering only a 9 year period (App. E-8).

testimony, was part of General Electric's evidence, vessels navigating south of 35° North latitude had a 4% chance of encountering gale force winds.[5] Thus, there was a one or two percent greater chance of encountering adverse weather on the actual route. The BRINTON LYKES and the DOLLY TURMAN during March of 1978 had undertaken voyages to Japan from the Gulf of Mexico via San Pedro. During the voyages the BRINTON LYKES encountered adverse weather, but this occurred in mid-ocean to the west of the position of the NANCY LYKES when she lost her cargo and the DOLLY TURMAN reported poor weather in the Gulf of Tehuantepec, which area is also remote from the site of the NANCY LYKES casualty (App. E-10).

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5 The pilot chart is a publication prepared on the basis of research done in the early part of the nineteenth century and updated from data furnished by the United States Naval Oceanographic office and by the Environmental Data & Information Service, National Oceanic & Atmospheric Administration. The Chart is published by the Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C.

Under the section entitled Gales in the upper right hand corner of the chart, the following appears:

"Gales have slackened considerably by April* * * * South of 35°N gales are not encountered more than 4% of the time."

REASONS FOR GRANTING THE WRIT

A

THE DECISIONS OF THE COURT OF APPEALS FOR THE SECOND AND SEVENTH CIRCUITS ARE SQUARELY IN CONFLICT ON THE ISSUE OF THE APPLICABILITY OF THE PACKAGE LIMITATION FOLLOWING THE FINDING OF AN UNREASONABLE GEOGRAPHICAL DEVIATION.

The questions presented for resolution in this petition are not only of extreme importance to the shipping industry but also fall specifically within Supreme Court Rule 17.1(a), outlining reasons for this Court to issue a *writ of certiorari*, which states:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . .

Prior to the enactment of COGSA, deviation without necessity or reasonable cause was considered such a breach of a carrier's duty as to cast the carrier into the role of an insurer, depriving it of the limitation of liability provision contained in the bill of lading. *The Willdomino* v. *Citro Chemical Co.*, 272 U.S. 718, 725 (1927); *St. Johns N.F. Shipping Corp.* v. *S.A. Companhia Geral, Commercial Do Rio de Janeiro etc.*, 263 U.S. 119 (1923). In 1936, however, COGSA was passed to provide uniform laws with respect to bills of lading. The statute was carefully drafted to strike a balance between the rights of the carrier and those of the shipper respectively, and it controls over the pre-existing common law principles in conflict with its express provisions.

The legislative history of the Act expressly states:

> PURPOSE OF LEGISLATION
>
> The purpose of the bill is to define by law the rights and liabilities of water carriers and shippers in foreign commerce.

It fixes an irreducible minimum of immunity of the carrier from liability [H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936)]

In urging the passage of COGSA, the House Report pertaining to the bill went on to state:

> The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading [Id at 7].

Section 1304(4) of COGSA specifically deals with the effect of deviations. It is immediately followed by Section 1304(5) which expressly provides that the carrier is not liable "in any event" in an amount exceeding $500 per package. The language of the two sections and their juxtaposition within the statute have given rise to the question of whether the limitation of liability provided in COGSA § 1304(5) should be applied despite an unreasonable geographical deviation. To date, two federal appellate courts have rendered conflicting answers.

In the instant case, having found an unreasonable geographical deviation, the court of appeals for the second circuit held the carrier, Lykes, was not entitled to the $500 package limitation of section 1304(5) of COGSA, (706 F.2d 80, 86; App. A-14).

Its decision is squarely in conflict with that of the court of appeals for the seventh circuit in *Atlantic Mutual Insurance Company* v. *Poseidon Schiffahrt*, 313 F.2d 872 (7th Cir.) *cert. denied* 375 U.S. 819 (1963). There, the seventh circuit affirmed the lower court's decision applying the $500 package limitation following its holding that the carrier had committed an unreasonable geographical deviation by over carrying the cargo.

In reaching this conclusion, both the district court and the court of appeals relied on the express language of § 1304(5). As the court of appeals stated, quoting from the opinion below:

> ". . . it appears to this [c]ourt that the language of the statute, if it constitutes a change of existing law, according to the rule applied to other statutes, is sufficiently clear and unmistakable. No amount of interpolation is required to evaluate the weight of the phrases 'in any event' and 'any loss or damage' upon the admonition that "neither the carrier nor the ship shall in any event be or become liable for any loss or damage * * * unless * * *" [313 F.2d at 8775].

The district court noted the separateness of admiralty law in our legal system from other bodies of law but, emphasized the superiority of statutory law:

> Admiralty in its inherent differences of setting from the rest of our body of law has never intended to confine to itself the authority to resist clear statutory direction, good law, good reasoning and clear legislative intent, by virtue of traditions which justifiably preserve it as a "different" body of law [206 F.Supp. 15, 18-19 (N.D. Ill., 1962)].

The appellate specifically adopted the reasoning of the lower court and added:

> . . . our conclusion finds support in the fact that the package limitation immediately follows § 4(4) of the Act, 46 USCA § 1304(4) in which Congress, as we have already stated, recognized the carrier's liability for unreasonable deviations. It is difficult for us to believe that Congress did not intend this limitation to apply to the section next preceding it [313 F.2d at 875].

The court of appeals for the second circuit, disagrees. In reaching the contrary conclusion, it has chosen to rely upon *Jones* v. *The FLYING CLIPPER*, 116 F.Supp. 386 (S.D.N.Y. 1953) and a number of its progeny but, it is important to note

at the outset, the *FLYING CLIPPER* did not involve a geographical deviation, rather, a quasi-deviation, a term of art adopted by courts to describe a situation where a carrier, in willful disregard of a clean bill of lading obligating below deck stowage, intentionally stows the cargo on-deck. Thus, a quasi-deviation is not a "deviation" in the legal sense but, rather, a term fashioned by the *FLYING CLIPPER* court to describe this unique type of near fraud perpetrated by a carrier upon a shipper in express contravention of the contract of carriage. Similarly, it is unlike the deviation at issue here, which involved a stop for fuel, permitted by the Bill of Lading, and a possible judgmental error in taking a recommended and recognized route whereon there was a one or two percent greater chance of encountering adverse weather (App. E-1; E-14; E-6; E-25; E-8).

More importantly, a "fundamental reason for the rule" enunciated in *The FLYING CLIPPER, supra*, at 389, no longer has any vitality. Unlike the case at bar and the *Atlantic Mutual* case *supra*, the claimant in *The FLYING CLIPPER, supra*, lost its insurance in the face of a deviation, a crucial fact lost sight of by the court of appeals for the second circuit. (See, discussion in Reason C *infra*.)

Ten years later, in the *Atlantic Mutual* case, the court of appeals for the seventh circuit noted the rationale of the FLYING CLIPPER decision:

> In Jones, the court reasoned that the doctrine of deviation was so firmly entrenched in maritime law that such a drastic change would have been expressed in clear and unmistakable language. [313 F.2d at 874.]

but "respectfully disagree[d]" relying upon none other than the clear and unmistakable language of § 1304(5).

The reasoning of the *FLYING CLIPPER, supra*, has been, unfortunately, followed in other quasi-deviation cases. *Encyclopaedia Britannica, Inc.* v. *S.S. HONG KONG PRODUCER*, 422 F.2d 7, 18 (2d Cir. 1969), *cert denied*, 397 U.S. 964 (1970), relied upon by the court below, also involved

quasi-deviation. There, the court of appeals for the second circuit applied the rule enunciated in the *FLYING CLIPPER*, *supra*, without discussion.

However, the well reasoned dissent in the *HONG KONG PRODUCER* adopted the rationale of the *Atlantic Mutual* case, *supra*. Judge Hays urged that the shipper's recovery should be limited to the $500 package limitation pursuant to § 1304(5) of COGSA. He noted, "[b]y its express terms, that section [1304(5)] applies 'in any event' ". Judge Hays further stated:

> . . . it seems highly unlikely that without including some more specific statutory direction the draftsman of COGSA intended that a breach of contract should relieve the carrier and the shipper of their rights and duties under the Act. The provisions of COGSA apply independently of any contract. See Benedict, 1 The Law of American Admiralty, 291 n. 35 (Knauth ed. 1940) [422 F. 2d at 20].

In *Du Pont de Nemours International S.A.* v. *S.S. MORMACVEGA*, 493 F.2d 97, 100 n.9 (2d Cir. 1974), a quasi-deviation case relied upon below, the court of appeals for the second circuit found stowage of containers on deck of the vessel did not constitute an unreasonable quasi-deviation. The referenced footnote was inappropriate dictum.

Finally, the court below also cited two court of appeals cases, from the ninth and fifth circuits respectively, in support of its holding on this issue. *Nemeth* v. *General Steamship Corp.*, 694 F.2d 609 (9th Cir. 1982) once again involved a so-called quasi-deviation or on deck/below deck deviation, rather than a geographical deviation. The *Nemeth* court found persuasive the fact that § 1304(4) of COGSA specifically mentions that "any reasonable deviation shall not be deemed to be an infringement or breach of this Act . . ." *Id.* at 613. It then concluded that an unreasonable deviation is a breach of the statute, holding:

> . . . section 4(4) implies that an unreasonable deviation is a breach by the carrier of COGSA, thereby depriving the carrier of COGSA's protection. [*Id.*]

But the *Nemeth* court failed to take into account the fact that other breaches of COGSA, such as a failure to exercise due diligence to provide a seaworthy ship, while depriving the carrier of the enumerated exemptions from liability set forth under section 1304(2), do not result in the forfeiture of the package limitation. See, *Iligan Intergrated Steel Mills, Inc.* v. *S.S. JOHN WEYERHAEUSER*, 507 F.2d 68 (2d Cir. 1974), *cert. denied* 421 U.S. 965 (1975). The package limitation has been applied in those circumstances "in any event."

Spartus Corp. v. *The S.S. YAFO*, 590 F.2d 1310 (5th Cir. 1979), the last case cited below in support of the denial of Lykes' right to the package limitation, is hardly comparable to the matter herein. In *YAFO*, the ocean carrier intentionally off-loaded the cargo in Mobile, Alabama rather than at the port of discharge named in the bill of lading after it decided to abort the voyage in order to take on military cargo destined for Israel, unlike the instant case where the NANCY LYKES was enroute to Kobe via San Pedro when the loss occurred. The court of appeals for the fifth circuit held this action constituted an unreasonable deviation and denied the carrier the § 1304(5) package limitation. Although the *YAFO* case, *supra*, did not involve a quasi-deviation of the type discussed in the *FLYING CLIPPER*, the *HONG KONG PRODUCER*, *supra* and the *MORMACVEGA*, *supra*, the actions of the carrier in *YAFO* were even more akin to fraud than the quasi-deviation cases.

Thus, the court below, in holding that an unreasonable geographical deviation under the law denies the carrier the section 1304(5) package limitation, mistakenly relied upon cases which either involved the issue of quasi-deviation or the intentional off loading of cargo in the wrong port. The court of appeals cited "[b]ut see also" the *Atlantic Mutual* case, *supra*, conceding its decision herein to have placed the court of

appeals for the second circuit squarely in conflict with the court of appeals for the seventh circuit, but did not discuss why it disagreed with the seventh circuit's statutory interpretation of the "in any event" language of § 1304(5). Consequently, this court should resolve the conflict between the circuits as to whether a carrier is entitled to the COGSA package limitation following an unreasonable geographical deviation.

B

THE COURT OF APPEALS FOR THE SECOND CIRCUIT DID NOT APPLY THE ANALYSIS MANDATED BY THIS COURT IN INTERPRETING A STATUTE

Another "Consideration[s] Governing Review on Certiorari" set forth in S. Court Rule 17 is where a federal court of appeals ". . . has decided a federal question in a way in conflict with applicable decisions of this court", S. Court Rule 17, 1 (c).

This Court has consistently held that "the language of a statute controls when sufficiently clear in the context" *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 492 (1947). The fundamental deficiency in the opinion of the court of appeals for the second circuit in the instant case is that in its analysis of the package limitation issue, it fails to take into account what, by law, must be the determinative factor in the resolution of any statutory interpretation question—the clear language of the statute. *Ernst*, *supra*.

The court below was specifically asked to decide whether a carrier was entitled to the package limitation pursuant to § 1304(5) of COGSA despite a finding of an unreasonable deviation. Section 1304(4) of COGSA specifically deals with deviations (quoted at p. 2) and is immediately followed by section 1304(5) which states:

Amount of Liability; Valuation of Cargo

> Neither the carrier nor the ship shall *in any event* be or become liable *for any loss or damage* to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States * * * unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading * * * *. [Emphasis Added]

It is painfully clear from the language "in any event" and "for any loss or damage" that Congress intended the $500 per package limitation to apply absent a declaration of the value, whether the vessel was unseaworthy, the carrier failed to properly stow and care for the cargo or the vessel deviated (see Reason A, p.8 *supra*, and C, pp. 16, 18 *infra*).

Noteworthy, too, is the fact that the language of section 1304(4), which states that a carrier is not "liable" for losses resulting from any reasonable deviation, implying that the carrier is liable for the losses resulting from an unreasonable one, is immediately followed by the package limitation section, the introductory heading of which states "Amount of Liability" and the text of which indicates that "in any event" the shipowner is entitled to the package limitation absent an express declaration of the value of the cargo by the shipper. Can it be seriously urged that the phrases "amount of liability," "in any event," and "for any loss" were intended to apply to sections 1303(1) and (2), and not to section 1304(4)?[6]

In *United States* v. *Turkette*, 452 U.S. 576 (1981), this Court, in interpreting a federal statute, ruled:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as

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6 Section 1302 expressly states that the carrier is entitled to the rights and immunities set forth in § 1304, which include the package limitation provision (App. D-1).

> conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 US 102, 108, 64 L.Ed 2d 766, 100 S. Ct. 2051 (1980). [*Id.*] at 580.

This Court then went on to reverse the first circuit's limitation of the statutory language "enterprise" noting that although the circuit court had set forth several reasons explaining why it had "clearly departed from and limited the statutory language", none were adequate. *Id.* at 581.

In the instant case, the only comment on the package limitation in the legislative history, appears in the House Report, as follows:

> Valuation clauses in bills of lading frequently restrict the recovery of the cargo owner to an agreed valuation as low as $100. This bill increases that limit to $500 per package or customary freight unit. [H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936) at 8.]

It would seem, if Congress had intended the words "in any event" and "for any loss" not to be given their plain language meaning, there would have been some mention in the legislative history of the exceptions intended or, at least, the guidelines to be utilized. Conspicuous by their absence are exceptions or guidelines. Hence, this Court's rule, "the language of a statute controls when sufficiently clear in the context", should be applied.

C

AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE, SETTLED BY THIS COURT IS RAISED BECAUSE THE APPELLATE COURT'S RATIONALE FOR DEPRIVING THE CARRIER OF THE PACKAGE LIMITATION IS WRONG AND CONTRARY TO THE PURPOSE OF THE STATUTE (COGSA).

The refusal by the court of appeals for the second circuit to apply the package limitation provision of COGSA section 1304(5) (entitled: "Amount of liability") following its finding of an unreasonable deviation in this case, when juxtaposed to its application in cases following a finding of a carrier's failure to exercise "due diligence to make the vessel seaworthy" pursuant to § 1303(1) is logically inconsistent and contrary to the purpose of the statute. *Iligan Integrated Steel Mills Inc., supra.*[7] The very heart of the carrier's commitment in a contract of carriage is its initial obligation to exercise due diligence before and at the beginning of the voyage to make the vessel seaworthy: to properly man, equip and supply the ship, and to make the holds, refrigeration and cooking chambers and other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation, 46 U.S.C. § 1303(1).

The importance of the duty to exercise "due diligence to make the vessel seaworthy" is highlighted by the position of primacy this provision occupies in the statutory framework of COGSA, appearing as it does immediately after the definition and introductory sections under the heading: "Responsibilities and liabilities of carrier and ship-Seaworthiness." Its significance is further underscored by the fact that the carrier is not entitled to rely on any of the exemptions from liability from designated causes set forth in section 1304(2)(a)-(q), when a finding of a failure to exercise such "due diligence" is made.

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7 Interestingly enough the issue in *Iligan, supra*, was whether the $500 package limitation was to be applied in the face of a failure to exercise due diligence to make the vessel seaworthy and it was.

Nonetheless, the court of appeals dismisses the failure to exercise due diligence as an "ordinary risk of shipping" while treating an unreasonable deviation as " . . . a serious breach of the contract of carriage . . . [706 F.2d 80, 87; App. A-17." Lykes respectfully submits that as between a possible judgmental error in choosing a route which increases the risk of encountering adverse weather by one or two percent (App. E-*25*; E-8) and sending a vessel and its personnel to sea in an unseaworthy condition, the former is a far less heinous act.

The conclusion of the court below stems from the ill-advised acceptance of the district court's rationale in the *FLYING CLIPPER, supra,* and its pre-COGSA progeny cited in the court's of appeals opinion, notwithstanding the fact that the holdings of those cases, on this issue, have been rendered obsolete by developments in marine insurance since the *FLYING CLIPPER* decision thirty years ago. Today, as observed by the same court of appeals, the shipper no longer becomes uninsured where the carrier has deviated. See *Iligan, supra,* at 72. In fact, modern marine cargo insurance covers the risk of an unreasonable deviation. As observed by Judge Oakes in his dissent in *Singapore Navigation Co. S.A.* v. *Mego Corp.*, 540 F.2d 39, 45 (2d Cir. 1976),

> . . .the underlying reason for the old rule of deviation was that the cargo lost its insurance when the vessel deviated, see Gilmore & C. Black, *The Law of Admiralty* 181-82 (2d ed. 1975), and at present cargo policies usually cover, at least until the cargo owner learns of a deviation. *Id.*

The most telling proof of this fact is the case at bar: General Electric was reimbursed by its cargo underwriters for the loss of the two locomotive cabs (App. E-19; E-4; E-7). Consequently, the antiquated rationale of the court below for imposing liability on the carrier as an insurer in the case of an unreasonable deviation on the grounds that it "exposed the shipper to additional and unanticipated risks" (607 F.2d 80, 87; App. A-17), no longer has any validity; a covered risk can hardly be characterized as additional or unanticipated. Accord-

ingly, a recovery by cargo interests results in a windfall to the cargo underwriter.

There is no logical reason to believe that denying the carrier the package limitation in unreasonable geographical deviation cases will have any more "salutary effect of discouraging such deviations [706 F.2d 80, 87; App. A-17]" than would depriving the carrier of the package limitation in cases where it has failed "to make the vessel seaworthy." See, *Iligan, supra*. Similarly, there is no logical basis to assume that the carrier's duty to "care" for the cargo would be weakened if the package limitation is sustained in cases of unreasonable geographic deviations since even where the carrier has been found liable for failing to properly care for the cargo under § 1303(2) of COGSA, the package limitation has been applied by no less authority than the same court of appeals. *Nichimen Company* v. *M.V. FARLAND*, 462 F.2d 319 (2nd Cir. 1972); see, also, *THE EDMUND FANNING*, 201 F.2d 281 (2nd Cir. 1953).

Moreover, the court of appeal's prophecy that the the distinction between reasonable and unreasonable deviations would be rendered meaningless if the package limitation is sustained (706 F.2d 80, 87; App. A-17), is wrong. Carriers would be and are liable for the full amount of damages to cargo when packages are not involved. *Mitsui & Co.* v. *American Export Lines, Inc.*, 636 F2d 807 (2nd Cir. 1981).[8] Carriers are likewise liable for the full amount of the damages where the shipper has inserted the value of the goods in the bill of lading before shipment, as provided for under § 1304(5).

While, indeed, shippers may be reluctant to exercise their option to declare the value, their willingness to do so can hardly be attributed to the carrier nor is it, realistically, the result of a failure to anticipate the risk of deviation given the nature of modern day marine insurance coverage. (App. E-19;

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8 Unlike the matter at bar, the *Mitsui* case *supra*, involved the construction of the word "package" in § 1304(5) which was left undefined in COGSA and, whose meaning, arguably, required modification in relation to developments and changes in shipping practices such as the development of container carriage.

E-4; E-7; see also *Singapore Navigation*, *supra*, at 45).[9] Obviously, where cargo interests are protected by their own insurance, they have no incentive or reason to declare the higher value particularly when to do so would result in the payment of higher freight rate.

At bottom, it is difficult to escape the conclusion that the reason for the court's of appeals for the second circuit decision in this case is its desire to avoid any result that would reduce a carrier's liability [706 F.2d 80, 87; App. A-17]. This same inappropriate reasoning could be applied to limitations applicable to innkeepers regarding the personal effects of their guests, to railroads, buses and planes with regard to their passengers' baggage, and any number of other limitation provisions, all of which by their very nature are arbitrary but have been deemed necessary by appropriate legislative bodies in order to facilitate the orderly function of the nation's commerce. Indeed, the provision with which we are concerned is less onerous than most limitation provisions because it permits full recovery of the loss if the shipper declares the value of its cargo.

However well meaning the court's motives, if there is a problem, the solution rests, not with the judiciary, but with the Congress. To torture the clear and unmistakable meaning of the "in any event" language of § 1304(5) is to ignore modern day commercial reality, and to follow cases that are on the one hand inappropriate and on the other hand, outdated is unjust. The plain language of the package limitation section provides the carrier with a statutory limitation of liability, when and only when packages are involved and their value is not declared. In exchange, the statute imposes, again in plain lan-

9 The reasoning the court of appeals for the ninth circuit in *Nemeth*, *supra* would lead one to believe that a shipper is not entitled to assume that the carrier will exercise due diligence because the case law is clear that even upon a finding of unseaworthiness the carrier may invoke the package limitation. See, *Iligan supra*. Thus, the ninth circuit's statement that nothing in COGSA indicates that shippers should anticipate a deviation (694 F.2d 609, 613) is illogical because in the same vein nothing in Cogsa indicates that a shipper should anticipate unseaworthiness.

guage, specific carrier duties. Given this Court's silence on this heretofore quiescent area of the law, this case cries out for review on a *writ of certiorari.*

D

THE FINDING OF AN UNREASONABLE DEVIATION IN THE CIRCUMSTANCES POINTS UP THE NEED FOR GUIDELINES FROM THIS COURT, INVOLVING AS IT DOES THE INTERPRETATION OF A FEDERAL STATUTE WHICH GOVERNS ALL OCEAN BILLS OF LADING TO OR FROM A PORT OF THE UNITED STATES.

A review of the facts available to Lykes at the time of the incident in question will establish that what the court below expected from Lykes was not reasonableness but prescience. See, *Singapore Navigation Co., S.A.* v. *Mego Corp., supra* at 45. In doing so, the court of appeals for the second circuit violated the teachings of this Court. See *The Steamship STYRIA* v. *Morgan,* 186 U.S. 1, 15 (1901).

In May 1978 San Pedro was recognized as a cheap bunkering port (App. E-11). In fact, 923 vessels had called at the port of San Pedro for bunkers only during the six month period preceding the incident in question (joint exhibits 12, 13). The bill of lading covering this shipment contained a liberties clause permitting the vessel to stop at any port for the purpose of taking on fuel oil (App. E-1). The NANCY LYKES was no stranger to the port of San Pedro having previously stopped there for bunkers (App. E-20) as had other Lykes vessels. Lykes had never been found to have committed an unreasonable geographical deviation because of a stop for bunkers.

The route chosen for the voyage, from the Panama Canal to Kobe via San Pedro, was a modified great circle route, the unmodified version of which appears on a governmental publication, the North Pacific Pilot Chart for April 1978 (App. E-25). The great circle route also appears in another governmental publication, Hydrographic Office Publication No. 151, entitled *Distances Between Ports,* which publication, while not

in the trial record, served as a source for extractions made by one of the maritime experts who testified on behalf of General Electric at the trial (App. E-6). The data he compiled indicates that the great circle route is in fact the shortest route from the Panama to Kobe (App. E-6). Interestingly enough, the route preferred by the weather expert who testified on behalf of General Electric at trial, does not appear, and is 125 miles longer than the route actually followed by the NANCY LYKES (App. E-9).[10]

The pilot chart indicates that south of latitude of 35°N, gales have slackened considerably by April and are not encountered more than 4 percent of the time. In other words, the NANCY LYKES had at least a 96 percent chance of not encountering gale force winds in the San Pedro area, which is south of 35°N and just a few miles east of the great circle route (App. E-25). In this context, noteworthy is the fact that the difference between the pilot chart estimate of 4 percent chance of encountering gale force winds and the 5-6 percent calculated by the weather expert who testified at trial on behalf of General Electric, amounts to a difference of merely 2 percent. Obviously, in selecting a route, Lykes did not calculate the probability percentage of encountering gale force winds over a 100 year period or, for that matter, over a nine year period as had the weather experts who testified at the trial on behalf of Lykes and General Electric (App. E-15; E-8).

The master followed a modified version of the great circle route upon the recommendation of Weather Routing, Inc., a company specializing in ocean routing (App. E-14). Unfortu-

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10 The court of appeals, in finding that the NANCY LYKES did not follow the customary route, stated "the course will only be considered customary when the route is "established and by all means published to the world", citing *W.R. Grace & Co. v. Toyo Kisen Kabushika Kaisha*, 12 F.2d 519, 521 (9th Cir. 1926), *cert. denied*, 273 U.S. 717 (1926), 706 F.2d 80, 85; App. A-11. Under this definition the great circle route is a customary route as it appears in two governmental publications from offices that are qualified to publish the type of data therein. On the other hand, had the NANCY LYKES followed General Electric's weather expert's preferred route it would not have been, by definition, proceeding on a customary course.

nately, the weather service's prediction was inaccurate, as a result of which the NANCY LYKES encountered adverse weather and suffered a loss of cargo. As acknowledged by Lykes' weather router, "Unfortunately our forecast was not perfect. We were right in the general idea of it, and but the specific details we were a little bit wrong." (Trial Transcript at 294.) As it turned out, the actual weather the NANCY LYKES would have encountered had she taken General Electric's weather expert's recommended route would have been favorable. But is it fair to impose this after the fact acquired knowledge on Lykes and on the master who was navigating the vessel at the time? According to this court's teachings it is not. See, *The Steamship STYRIA*, *supra* at 15.

The circumstances in this case can hardly be compared with those presented in the cases cited by the court of appeals in support of its holding that Lykes' deviation to San Pedro was unreasonable. In *The WILDOMINO* v. *Citro Chemical Co.*, *supra*, the vessel and her owners were attempting to perpetuate what can only be characterized as a scam on cargo interests. As this Court observed:

> It is clear enough that for some reason not quite definitely disclosed the officers of the vessel under direction of the owners while realizing that there was not enough coal on board for such voyage, wished to create the impression that she left Ponta Delgada bound directly for New York, when in truth they intended to take her to North Sidney under pretense of an emergency. [272 U.S. 718, 726]

Interestingly, this Court did not consider the vessel's action in taking on bunkers at Gibraltar pursuant to a liberties clause similar to the one herein (*Id.* at 725; E1) to be an unjustifiable deviation nothwithstanding that the ship commenced a voyage from Messina, Italy carrying cargo bound for New York with insufficient bunkers to reach New York.

In *The WAALHAVEN*, 36 F.2d 706 (2 Cir. 1929), *cert. denied* 281 U.S. 747 (1930), another pre COGSA case, the vessel encountered fields of ice which the court of appeals

found were usual, if not inevitable, and were a condition known to the master and the owners, *Id.* at 707. The ship was damaged and the cargo was wetted, thus arose the lawsuit. Noteworthy, is the court of appeals' statement that "[h]ad the master followed his original purpose of taking on enough bunkers at St. Johns to reach Jacksonville, or perhaps Norfolk, we should not, therefore hold the ship." *Id.* at 709. This, notwithstanding the fact that the court of appeals also stated "[c]ertainly this ship was insufficiently bunkered when she broke ground." *Id.* at 708.

Can it be said that an increased risk of 1 or 2 percent of encountering gale force winds (App. 3-*25*; E-8) is the equivalent of knowingly exposing a vessel to ice fields?

The Court of Appeals' reliance on yet a third pre-COGSA case, *The FREDERICK LUCKENBACH*, 15 F.2d 241 (S.D.N.Y. 1926), is also misplaced. There, instead of sailing directly from Cologne through the Yucatan Channel to Mobile and New Orleans the vessel sailed through the Windward Passage to Neuwitas, Cuba for the purpose of discharging cargo. The vessel encountered a hurricane and it and the cargo were seriously damaged. The district court found:

> In no business sense can it be said that Neuwitas, on the north coast of Cuba, would be passed in the usual course of a voyage from the Pacific coast to Mobile and New Orleans. The ship not only went out of her way, but in so doing took a course which involved well-known difficulties and dangers of navigation . . . [*Id.* at 243.]

How can a known danger of a hurricane be compared with a 1 or 2 percent greater chance of encountering gale force winds? (App. E-25; E-8) In addition, it cannot be said that stopping at San Pedro, which is just off the great circle route (App. E-*25*), is the equivalent of proceeding to Neuwitas, Cuba given the fact that the great circle route appears in respected governmental publications (App. E-*25*; see also E-6). Interesting too, is the fact that in the *FREDERICK LUCKENBACH*, because of the liberties clause in one of the bills of lading, the court found no deviation as to that bill of lading notwithstanding that it

also found no knowledge on the part of the claimant of the vessel's course. *Id.* at 243-4.

This court has never set forth guidelines with respect to what constitutes an unreasonable deviation following the enactment of COGSA. Given the court of appeals' Monday morning quarterbacking approach to the facts of this case and its reliance on inappropriate authority in support of its finding of an unreasonable deviation, justice requires that this Court grant *certiorari*.

CONCLUSION

FOR ALL THE FOREGOING REASONS, IT IS RESPECTFULLY URGED THAT THIS PETITION FOR A WRIT OF CERTIORARI BE GRANTED.

Dated: July 19, 1983

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 809—August Term, 1982

Argued: February 7, 1983 Decided: April 20, 1983

Docket No. 82-7709

GENERAL ELECTRIC COMPANY INTERNATIONAL SALES DIVISION,

Plaintiff-Appellee,

—against—

S.S. NANCY LYKES, her engines, boilers, etc. and LYKES BROS. STEAMSHIP COMPANY, INC.,

Defendants-Appellants.

Before:

LUMBARD and CARDAMONE, *Circuit Judges,* and ZAMPANO, *District Judge.**

* Honorable Robert C. Zampano, United States Senior District Judge for the District of Connecticut, sitting by designation.

Appeal from a judgment of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge*, awarding the plaintiff $1,709,000 in damages for the loss of cargo washed overboard from the defendant's vessel during the course of an unreasonable deviation.

Affirmed.

HOLLIS M. WALKER, JR., ESQ., New York, N.Y. (Walker & Corsa, New York, N.Y., Vera E. Weinberg, Esq., Harold V. Higham, Esq., of counsel), *for Defendants-Appellants*.

JOHN E. CONE, JR., ESQ., New York, N.Y., (Bigham Englar Jones & Houston, New York, N.Y., Helen M. Benzie, Esq., Lawrence B. Brennan, Esq., of counsel), *for Plaintiff-Appellee*.

LUMBARD, *Circuit Judge*:

Carrying on its deck three 50 to 52 ton locomotive cabs shipped by General Electric Company International Sales Division ("GE") to Taiwan, the S.S. Nancy Lykes, on a voyage from the Gulf Coast to Kobe, Japan and the Far East, ran into heavy seas and winds soon after leaving the port of San Pedro-Long Beach, California on May 4, 1978. In the early morning of May 5, 1978, two of the

locomotive cabs broke their bindings and were washed overboard.

Invoking admiralty jurisdiction, GE commenced this action against the vessel and its owner, Lykes Bros. Steamship Company ("Lykes"), on June 13, 1980. GE asserted that the call at San Pedro was a deviation from the Nancy Lykes' published itinerary and from the customary routes taken by vessels traveling from the Gulf to the Far East via the Panama Canal and that the deviation led to the vessel's encounter with the adverse weather which caused the loss of the locomotive cabs. Arguing that the Nancy Lykes ran a substantially higher risk of adverse weather conditions by proceeding to the Far East from San Pedro rather than along the customary routes to Kobe, GE asserted that the deviation was not reasonable under the circumstances and thus constituted a breach of the contract of carriage under the terms of § 4(4) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1304(4)(1976).

On April 15, 1982, after a three day bench trial, Judge Lasker, finding that the vessel's call at San Pedro did not constitute a reasonable deviation allowed by terms of § 4(4) of COGSA, held Lykes liable for the full amount of the loss, including the cost of shipping replacement cabs to Taiwan.[1] 536 F. Supp. 687 (S.D.N.Y. 1982). Essential to this holding was Judge Lasker's determination that the stop of the Nancy Lykes at San Pedro was a deviation which unjustifiably exposed the vessel and its cargo to significantly greater risks of adverse weather, thereby rendering the deviation unreasonable.

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[1] GE also contended that the locomotive cabs were not properly secured on deck, but it does not challenge Judge Lasker's ruling that it had not sufficiently proved this allegation.

Lykes asserts that Judge Lasker erred in finding an unreasonable deviation, and that, in any event, Judge Lasker improperly held that recovery was not limited to the $500 per package liability limitation contained in the contract of carriage and in § 4(5) of COGSA, 46 U.S.C. § 1304(5)(1976).

We agree with Judge Lasker's thorough decision and thus affirm the judgment.

I.

The basic facts are not in dispute. On April 16, 1978, three locomotive cabs manufactured by GE were loaded onto the deck of the Nancy Lykes in New Orleans pursuant to a bill of lading which provided for shipment to Keelung, Taiwan. The locomotive cabs were 56 feet long, 10 feet wide, 13 feet high, and weighed between 50 and 52 tons. The bill of lading, which incorporated the provisions of COGSA, allowed the locomotive cabs, which could not be stowed below deck because of their great bulk, to be secured and stowed on deck. The bill of lading also contained in paragraph 3 a standard "liberties" clause, which defined the scope of the voyage as including "usual, customary, or advertised ports, whether herein named or not, and ports in or out of the advertised, geographical, or usual route or order," and specifically allowed the vessel to "call at any port . . . [to] take fuel oil. . . ."

Kobe, Japan was to be the Nancy Lykes' first port of call in the Far East, with an estimated arrival date of May 11, 1978. Prior to departure of the vessel from the Gulf Coast, Lykes decided to send the Nancy Lykes to the port of San Pedro to obtain the more than 12,000 barrels of

bunker fuel ("bunkers") necessary to complete the voyage to Kobe.

San Pedro, approximately 2,900 miles north of the Panama Canal, was not an advertised port on the Nancy Lykes' published itinerary, and the decision to send the vessel there was never communicated to GE or otherwise made known to the shipping community. Lykes acknowledges that in making the decision to send the Nancy Lykes to San Pedro, it never considered any factor other than the advantage of less expensive fuel prices that had become available at that port in early 1978, and it concedes that there was an ample supply of slightly more expensive bunker fuel at New Orleans and at other ports on the Nancy Lykes' route from the Gulf to the Panama Canal.

In fact, the Nancy Lykes had never before bunkered at San Pedro while voyaging from the Gulf Coast to the Far East, and of Lykes' forty or more vessels, only two had ever previously stopped at San Pedro solely to take on bunker fuel during such a voyage: the S.S. Dolly Thurman on March 22, 1978 and the S.S. Brinton Lykes on March 30, 1978. Moreover, although at least 30 of GE's locomotive cabs had previously been transported by Lykes' vessels to the Far East, GE was not informed of the routes taken by these vessels and had no knowledge whether they called at ports other than those specified in their published itineraries.

Pursuant to Lykes' instructions, the Nancy Lykes, after transiting the Panama Canal, voyaged to San Pedro and there obtained 12,877 additional barrels of bunker fuel. On May 4, 1978, the vessel departed San Pedro on a route that took it to the north of that port and soon encountered rough waters and gale force winds which measured

between 8 and 10 on the Beaufort Scale.[2] At 0430 on May 5, 1978, two of the three locomotive cabs broke their lashings and were washed overboard within three minutes of each other. The loss occurred at 34° N to 35° N and 121° W, a position close to the California coast. Having suffered no major structural damage, the vessel completed its voyage to the Far East.

Pursuant to its agreement with the Taiwan Railway Administration, the purchaser of the locomotive cabs, GE was required to replace the lost cabs at a cost of $1,709,000, which included $71,000 for ocean freight to Taiwan.

II.

Finding that the Nancy Lykes had engaged in an unreasonable deviation by bunkering at San Pedro, Judge Lasker held Lykes liable for the loss of the locomotive cabs on the basis of § 4(4) of COGSA, 46 U.S.C. § 1304(4) (1976), which provides:

> Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading

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2 In relevant part, the Beaufort Scale is as follows:

Beaufort Number	*Wind Speed in Knots*	*Miles Per Hour*
8	34-40	39-46
9	41-47	47-54
10	48-55	55-63

> cargo or passengers it shall, prima facie, be regarded as unreasonable. [Emphasis in original].

This section clearly implies that any *unreasonable* deviation is to be treated as a breach of COGSA and the contract of carriage. *Nemeth v. General Steamship Corp.*, 694 F.2d 609, 613 (9th Cir. 1982); *see also Rosenbruch v. American Isbrandtsen Lines, Inc.*, 543 F.2d 967, 971 (2d Cir.), *cert. denied*, 429 U.S. 939 (1976); *DuPont de Nemours International S.A. v. S.S. Mormacvega*, 493 F.2d 97, 101 (2d Cir. 1974). Lykes challenges Judge Lasker's finding of an unreasonable deviation for three reasons: (1) the liberties clause in the bill of lading allowed the bunkers call at San Pedro without regard to the terms of § 4(4); (2) the bunkers call was not a deviation; and (3) even if a deviation, the bunkers call was not unreasonable. We see no merit in Lykes' contentions.

A. *Effect of the Liberties Clause*

Lykes argues that in light of the broad liberties clause contained in paragraph 3 of the bill of lading, the Nancy Lykes' call for bunkers at San Pedro cannot under any circumstances be considered a breach of COGSA or the contract of carriage. In relevant part, the liberties clause provided:

> The scope of the voyage herein contracted for shall include usual, customary, or advertised ports, whether herein named or not, and ports in or out of the advertised, geographical, or usual route or order, even though in proceeding thereto the ship may sail beyond the port of discharge, or in a direction contrary thereto, . . . or depart from the direct or customary route. The ship may call at any port . . .

> [to] take fuel oil, . . . and all of the foregoing are included in the contract voyage.

Reasoning that liberties clauses must be consistent with § 4(4)'s treatment of reasonable and unreasonable deviations, Judge Lasker held that these clauses, like § 4(4), only permit reasonable deviations from the anticipated journey. We agree.

Even before COGSA was enacted in 1936, it was well settled that liberties clauses, though broad in language, were limited in scope. *See, e.g., The Willdomino*, 300 F. 5, 18 (3d Cir. 1924), *aff'd sub nom. The Willdomino v. Citro Chemical Co.*, 272 U.S. 718 (1927); *The Blandon*, 287 F. 722, 725 (S.D.N.Y. 1922). Because liberties clauses refer to the voyage contemplated by the parties, and not to a different voyage determined unilaterally by the carrier, these clauses have long been interpreted to give the carrier only a limited right to deviate when such a deviation is reasonable under all the circumstances. *See, e.g., Hellenic Lines, Ltd. v. United States*, 512 F.2d 1196, 1206 (2d Cir. 1976); *The San Giuseppe*, 122 F.2d 579, 582-84 (4th Cir. 1941); *The Willdomino, supra*, 300 F. at 18; *The Blandon, supra*, 287 F. at 725; *see also* G. Gilmore & C. Black, The Law of Admiralty 178 (2d ed. 1975).

A construction of liberties clauses that allowed carriers to deviate with impunity would seriously erode the carrier's primary duty under § 3(2) of COGSA, 46 U.S.C. § 1303(2)(1976), to "properly . . . carry . . . [and] care for . . . the goods carried," and thus would be contrary to COGSA's design of forbidding carriers from contracting out of liability for their own wrongdoing. *See Hellenic Lines, Ltd. v. United States, supra*, 512 F.2d at 1206; *see also* G. Gilmore & C. Black, *supra*, at 178. Indeed, COGSA's legislative history clearly reveals an intent to

limit by statute the ability of carriers, through the use of broad liberties clauses, to set their own standards of proper carriage. The 1936 report of the House Committee on Merchant Marine and Fisheries, noting that the purpose of COGSA was to "fix[ ] an irreducible minimum of immunity of the carrier from liability," H.R. Rep. No. 2218, 74th Cong., 2d Sess. 1 (1936), commented:

> It is common in bills of lading to provide in general terms for the utmost latitude to the vessel in making a voyage. This is so changed by [section 4(4) of] the bill [COGSA] that *deviations from the contracted voyage are restricted to* deviation for the purpose of saving life or property at sea and *any reasonable deviation*.

Id. at 7 (emphasis supplied).

We agree, therefore, with Judge Lasker that liberties clauses must be construed to permit only reasonable deviations and that the presence of such a clause in the bill of lading did not give Lykes any deviation rights beyond those allowed by § 4(4) of COGSA.

B. *The Question of Deviation*

We also agree with Judge Lasker that the Nancy Lykes' call for bunkers at San Pedro constituted a deviation. As Judge Lasker found, San Pedro was never advertised as a port of call in the vessel's published itinerary and was not on the ordinary trade routes from the Panama Canal to Kobe and the Far East. This finding was confirmed by the testimony of Lykes' own weather routing expert. Moreover, Judge Lasker found that at least for vessels operating on scheduled liner services such as the Nancy Lykes,

bunkers at that time were normally obtained only at ports advertised in the vessel's itinerary.[3]

Lykes acknowledges that a deviation results when a vessel " 'wander[s] or stray[s] . . . from the customary course of the voyage,' " *Spartus Corp. v. S.S. Yafo*, 590 F.2d 1310, 1313 (5th Cir. 1979) (quoting *G.W. Sheldon & Co. v. Hamburg Amerikanische Packetfahrt*, 28 F.2d 249, 251 (3d Cir. 1928)); *see also* G. Gilmore & C. Black, *supra*, at 177, but argues that the Nancy Lykes' bunkers call at San Pedro was not a deviation from the usual routes on the ground that the vessel's course from San Pedro in fact merged with and followed the northernmost customary route when the vessel reached mid-ocean at 170° W to 180° W. We disagree.

Lykes' contention not only disregards Judge Lasker's finding with respect to the bunkering customs of liner services, but ignores the fact that San Pedro and the site of the casualty are close to 120° W, and at that point the vessel was approximately 600 miles and 1320 miles north, respectively, of the northernmost and southernmost customary routes from the Canal to the Far East.[4] Numerous cases have held similar or smaller route variations to be deviations. *See, e.g., The Willdomino v. Citro Chemical Co.*, 272 U.S. 718, 727-28 (1927) (vessel traveled 300 miles north of the customary trade route from Lisbon to New York to obtain bunkers at North Sydney, Nova

[3] The district court found that the evidence established that liner services, as opposed to "tramp" ventures, hold themselves to a high degree of schedule exactness upon which the shipping community relies. Thus, liners do not seek bunkers at ports not advertised since such a diversion would normally delay the vessel.

[4] San Pedro and the site of the loss are in the region of 33° N to 35° N and 118° W to 121° W. At 120° W, the northernmost and southernmost customary routes from the Canal to the Far East are near 25° N and 13° N respectively.

Scotia); *World Wide Steamship Co. v. India Supply Mission*, 316 F. Supp. 190, 192 (S.D.N.Y. 1970) (during voyage from Gibralter to the Suez Canal vessel called at port of Piraeus, Greece for additional cargo, thereby adding 184 miles to the voyage and delaying the vessel at least 3 days); *The Frederick Luckenbach*, 15 F.2d 241, 243 (S.D.N.Y. 1926) (vessel, on route from Colon, Panama to Mobile or New Orleans, left the customary route and made a trip to Neuvitas, Cuba, thereby increasing the length of the journey by over 400 miles); *The Maine*, 8 F.2d 291, 292 (S.D.N.Y. 1924) (vessel called at New York for inexpensive bunkers on a voyage from Galveston to Gibralter).

Also lacking merit is Lykes' contention that the prior bunkers calls at San Pedro in March 1978 of two of its vessels, the Dolly Thurman and the Brinton Lykes, rendered that stop customary for vessels voyaging from the Gulf to the Far East. A course will only be considered customary when the route is "*established and by all means published to the world.*" *W.R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha*, 12 F.2d 519, 521 (9th Cir. 1926) (emphasis supplied), *cert. denied*, 273 U.S. 717 (1926); *see also The Frederick Luckenbach, supra*, 15 F.2d at 243. Certainly, the bunkers calls at San Pedro of these two Lykes vessels on Gulf to Far East voyages does not make that stop customary. There is no evidence that the previous bunkers calls at San Pedro of the Dolly Thurman and the Brinton Lykes were made known to GE or generally published to the shipping community, and it is undisputed that GE did not know that such a stop was planned for the Nancy Lykes. *Cf. Hostetter v. Park*, 137 U.S. 30, 40 (1890) (call at a port will not be a deviation where such stop is either revealed to the shipper or generally made known to the shipping community); *The*

Frederick Luckenbach, supra, 15 F.2d at 243 (same). Beyond doubt, therefore, a call at San Pedro solely for bunkers on a Gulf Coast to Far East voyage was not customary at the time of the Nancy Lykes' voyage.[5]

C. *The Reasonableness of the Deviation*

The reasonableness of the Nancy Lykes' deviation from the customary route depends on an assessment of all the surrounding circumstances. *See The Willdomino, supra*, 300 F. at 19; *Squillante & Zimmerman Sales, Inc. v. Puerto Rico Marine Management, Inc.*, 516 F. Supp. 1049, 1053 (D.P.R. 1981), *aff'd mem.*, 685 F.2d 421 (1st Cir. 1982); *Surrendra (Overseas) Private, Ltd. v. S.S. Hellenic Hero*, 213 F. Supp. 97, 101-02 (S.D.N.Y.), *aff'd*, 324 F.2d 955 (2d Cir. 1963) (per curiam); *American Cyanamid Co. v. Booth Steamship Co.*, 99 F. Supp. 232, 237 (S.D.N.Y. 1951), *aff'd sub nom. Feuer v. Booth Steamship Co.*, 195 F.2d 529 (2d Cir. 1952) (per curiam). Judge Lasker found that the Nancy Lykes, by stopping at San Pedro rather than voyaging directly from the Panama Canal to the Far East, was assured, no matter what route was taken to the Far East from San Pedro, of passing through regions north of 30° N and near the California coast in which there was a known and increased risk of encountering adverse weather during the springtime months. In so finding, Judge Lasker accepted GE's evidence which showed that the customary routes to

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[5] The record indicates that soon after the Nancy Lykes' voyage, Lykes and other liner services, seeking to take advantage of the lower fuel prices offered at San Pedro, began to advertise San Pedro as a port of call on Gulf to Far East voyages. Indeed, by June 1981, Lykes' vessels had made over 100 stops at San Pedro on such voyages. Of course, these later developments have no bearing on whether a customary route to San Pedro in fact existed at the time of Nancy Lykes' voyage.

the Far East were generally calmer during springtime and thus that the risk of unfavorable weather conditions would have been significantly reduced had the vessel not deviated. Judge Lasker also found that Lykes should have been forewarned of the dangers of deviating to San Pedro by the experience of the Dolly Thurman and the Brinton Lykes which, in calling at San Pedro in the early springtime, had encountered bad weather on courses to and from that port respectively. These findings are supported by the record and are not clearly erroneous.

We agree with Judge Lasker that, under all the circumstances, the Nancy Lykes' deviation to San Pedro to obtain inexpensive bunkers was unreasonable. In *The Waalhaven*, 36 F.2d 706 (2d Cir. 1929), *cert. denied*, 281 U.S. 747 (1930), a pre-COGSA case, we held that the vessel was liable for cargo damage resulting from a deviation taken to obtain inexpensive bunker fuel when the carrier's decision to deviate knowingly exposed the vessel without justification to the dangerous ice fields which caused the casualty. We noted that the ice fields were a "danger to which she [the vessel] had no right to expose the shippers" and that the "ship's duty was to sail direct, avoiding the ice, as was entirely practicable." *Id.* at 709. In another pre-COGSA case, *The Frederick Luckenbach*, *supra*, the court held the vessel liable for damage to cargo caused by a hurricane encountered on the course of a deviation when the deviation, the purpose of which was merely to discharge cargo, took the vessel on "a course which involved well-known difficulties and dangers of navigation, all of which would have been avoided by taking the direct and usual course. . . ."[6] 15

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[6] Lykes attempts to undercut the pertinence of *The Frederick Luckenbach* by noting that the court there focused on the construction to be

F.2d at 243. These cases suggest that a deviation is unreasonable, thereby breaching the contract of carriage, when, in the absence of significant countervailing factors, the deviation substantially increases the exposure of cargo to foreseeable dangers that would have been avoided had no deviation occurred. *See also* G. Gilmore & C. Black, *supra*, at 179 ("The carrier . . . is always subject to the § 3(2) [of COGSA, 46 U.S.C. § 1303(2) (1976)] duty to care for and carry the goods properly, and his decision on a route would seem to be improper and unreasonable whenever it is made in disregard of that duty."). We conclude, therefore, that Nancy Lykes' deviation to San Pedro, which subjected the cargo to a known and substantially increased probability of adverse weather for the sole purpose of allowing Lykes to realize fuel cost savings, was unreasonable.

III.

Lykes argues that even if the Nancy Lykes engaged in an unreasonable deviation, thereby breaching the contract of carriage and § 4(4), Lykes is nonetheless entitled to limit its liability to $500 per package pursuant to the terms of § 4(5) of COGSA, 46 U.S.C. § 1304(5)(1976). We agree with Judge Lasker that Lykes is liable for the full amount of the loss.

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given to liberties clauses and held the vessel liable to all but one of the shippers only after determining that none of the liberties clauses in the bills of lading, with the exception of one which was similar to the liberties clause in the instant case, was broad enough to authorize a deviation from the usual course. *See* 15 F.2d at 244. We believe, however, that the court's holding of liability is relevant to our examination of the reasonableness of the Nancy Lykes' deviation, especially in light of our conclusion in part II.A. that all liberties clauses only allow reasonable deviations.

Section 4(5) of COGSA reads:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States,. . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.[7]

It is undisputed that, prior to COGSA's enactment, an unreasonable deviation, whether geographic or otherwise, deprived the carrier of all liability limitations on the ground that such deviations ousted the contract of carriage and made the carrier fully responsible for the cargo as an insurer. *See, e.g., The Willdomino v. Citro Chemical Co., supra*, 272 U.S. at 725 (geographic deviation); *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio de Janeiro*, 263 U.S. 119, 124 (1923) (quasi-deviation of stowing goods on deck in contravention of bill of lading providing for below deck stowage); *see also* G. Gilmore & C. Black, *supra*, at 176-77, 180. In the first post-COGSA case to address this issue, Judge Weinfeld determined that, at least where the loss was

[7] Section 4(5) of COGSA applies in this case not as a matter of law but as a matter of contract. Because the bill of lading issued to Lykes expressly provided for carriage of cargo on deck, the locomotive cabs are not in fact "goods" covered by § 4(5). *See* COGSA § 1(c), 46 U.S.C. § 1301(c)(1976) ("The term 'goods' includes goods, wares, merchandise, and articles of every kind, whatsoever, except . . . cargo which by the contract of carriage is stated as being carried on deck and is so carried."). However, since the provisions of COGSA are fully incorporated in the instant bill of lading, § 4(5) is applicable as a contractural term. *See Jones v. The Flying Clipper*, 116 F. Supp. 386, 388 (S.D.N.Y. 1953) ("[The bill of lading] defines the rights, duties, exemptions, and limitations of the parties, whether imposed by statute or the result of voluntary agreement.").

causally related to the deviation, COGSA was not intended to change the existing law, and accordingly held that an unreasonable deviation deprives the carrier of the benefit of section 4(5)'s liability limitation. *Jones v. The Flying Clipper*, 116 F. Supp. 386, 388-90 (S.D.N.Y. 1953). Explicitly adopting the rule of *The Flying Clipper*, we have held that "it is the law of this Circuit that any . . . unreasonable deviation from the contract of carriage will deprive the carrier of . . . [the § 4(5)] statutory limitation of liability." *DuPont de Nemours International S.A. v. S.S. Mormacvega, supra*, 493 F.2d at 100 n.9; *see also Encyclopaedia Brittanica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 18 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). Other circuits are in accord. *Nemeth v. General Steamship Corp., supra*, 694 F.2d at 612-13 (9th Cir.); *Spartus Corp. v. S.S. Yafo, supra*, 590 F.2d at 1316-17 (5th Cir.). *But see Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt*, 313 F.2d 872, 874-75 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963).

Lykes urges us to abandon *The Flying Clipper* rule on the ground that modern marine insurance has eliminated the need for depriving the carrier of the benefit of the liability limitation. One of the underlying reasons for the traditional rule affirmed in *The Flying Clipper* was that the shipper lost its insurance coverage when the vessel deviated. *The Flying Clipper, supra*, 116 F. Supp. at 389; *see also* G. Gilmore & C. Black, *supra*, at 181-82. Lykes argues that because modern marine insurance policies usually contain clauses which provide that the risks of deviation are covered, *see* G. Gilmore & C. Black, *supra*, at 182, there is no longer any justification for the rule. *See also Singapore Navigation Co. v. Mego Corp.*, 540 F.2d 39, 45 (2d Cir. 1976) (Oakes, *J.*, dissenting). We disagree.

Unlike ordinary risks of shipping such as negligence in the stowage or handling of cargo or lack of due diligence in making the vessel seaworthy, unreasonable deviations are "fundamental breach[es] which go[ ] to the very essence of the undertaking," *The Flying Clipper, supra*, 116 F. Supp. at 390, since they expose cargo to "unanticipated and additional risks." *Id.* at 389; *cf. Nemeth v. General Steamship Corp., supra*, 694 F.2d at 613 ("[m]ere negligence in the stowage or handling of cargo . . . might be considered an inherent risk of shipping"). It follows that a deviation which unjustifiably exposes cargo to unanticipated risks is such a serious breach of the contract of carriage that the carrier must be deprived of the protection of the § 4(5) liability limitation. *See Nemeth v. General Steamship Corp., supra*, 694 F.2d at 613.

Indeed, exposing carriers which engage in unreasonable deviations to the risk of full liability has the salutary effect of discouraging such deviations. On the other hand, to allow carriers to limit their liability when an unreasonable deviation causes damage to cargo not only would weaken the carrier's primary duty of care to cargo under § 3(2) of COGSA, 46 U.S.C. § 1303(2) (1976), but would render meaningless the § 4(4) distinction between reasonable and unreasonable deviations. *See Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 815 (2d Cir. 1981). Such a result is not warranted. *See id.* ("In interpreting § 4(5), courts must . . . take a critical look at any proposed construction . . . that would reduce a carrier's liability below reasonable limits."). We see no reason, therefore, to abandon a rule the ultimate effect of which is to preserve and enforce the underlying policies of COGSA.

Affirmed.

Appendix B

B1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 3348 (MEL)

OPINION #53033

GENERAL ELECTRIC COMPANY,
INTERNATIONAL SALES DIVISION,

Plaintiff,

—against—

SS "NANCY LYKES", her engines, boilers, etc., and
LYKES BROS. STEAMSHIP CO., INC.,

Defendants.

APPEARANCES:

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Of Counsel:
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Attorneys for Defendant

Of Counsel:
DANIEL J. KEENAGHAN, ESQ.

LASKER, D.J.

General Electric Company International Sales Division ("GE") sues to recover for two locomotive cabs which were shipped by Lykes Bros. Steamship Company ("Lykes") via its liner service aboard the vessel the S.S. Nancy Lykes from New Orleans, Louisiana, destination Keelung, Taiwan. The locomotives were lost at sea on May 5, 1978, when the vessel encountered gale winds and rough seas off the coast of California.

The relevant voyage of the Nancy Lykes commenced in Mobile, Alabama on April 10, 1978, and proceeded to New Orleans, its first port of call. The advertised itinerary for the vessel listed Yokohama, Japan ("Kobe") as the next port of call, with an estimated arrival date of May 11, 1978. Instead of proceeding directly to Kobe after passing through the Panama Canal, however, the vessel next went to San Pedro, California, to secure fuel (bunkers). San Pedro was not listed on the published itinerary of the voyage. Lykes candidly acknowledges that the stop was made to take advantage of the low fuel prices then available at San Pedro and that its operations department directed the master to make the stop while the vessel was still in the Gulf area.

I.

GE contends that the bunkers call at San Pedro constituted an unreasonable deviation from the published itinerary of the vessel and that the deviation caused the vessel to encounter the gales which precipated the loss of the locomotives. In addition, GE alleges that the locomotives, which were stowed on deck, were not properly secured.

GE's weather routing expert, Robert Raguso,[1] testified that by proceeding to San Pedro rather than along the ordinary

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1 Raguso is currently employed and has been for fourteen years by the Bendix Field Engineering Corporation as manager of the Marine Science Service Department, where he directs a staff of meteorologists, oceanographers and licensed ships' officers and communication technicians. He is

direct route to Kobe the Nancy Lykes ran a substantially higher risk of encountering unfavorable weather. According to Raguso, the first weather risk would be confronted as the vessel moved from the Panama Canal up the coast of California toward San Pedro. Such a route necessitated passing through the Gulf of Tehuantepec where, Raguso testified, there are many local gales or high winds during the winter and spring months. (Tr. at 60-62). In addition, Raguso testified that the stop at San Pedro also entailed confronting a second weather risk off the coast of California after leaving San Pedro. According to Raguso, mariners and meteorologists are generally familiar with winds which are indigenous to the California coast, some of which are known as Santa Anna winds, some Chinook winds, and others Boras winds. These winds regularly occur off the coast of California during the winter and spring months, and it is these winds which Raguso believes the Nancy Lykes faced on May 5th. He testified that it was evident from May 1, 1978, that northerly winds were dominating the California coast in a corridor between 43 degrees north latitude down to 32 or 30 degrees north latitude in the coastal region. (Tr. at 79). Utilizing weather reports from vessels published in the Mariner's Weather Log for the past ten years, Raguso estimated that there is a five to six percent probability of gales occurring off the California coast during the month of May. (Tr. at 84-85). According to Raguso, he treats a probability of unfavorable weather of above one-half of one percent as a potential adverse condition to take into consideration in routing a vessel. (Tr. at 136).

Raguso testified that the usual trade route from the Panama Canal to Japan would be within the area between 33 degrees north latitude and 16 or 17 degrees north latitude at 150 degrees northwest longitude on the southern side and that, had the Nancy Lykes stayed within this usual route area on the particular voyage, it would not have encountered the gale

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involved in ship routing, voyage performance surveys and other marine and meteorological activity. Prior to his present position, he was employed in other firms doing similar work.

winds which ultimately caused it to lose the locomotives. (Tr. 94-95-96). Moreover, it was Raguso's opinion that, in view of the fact that the vessel was carrying such heavy cargo on deck, he would have considered safety to be the paramount factor in routing the vessel and he testified that he would have recommended the southernmost route within the customary area in view of the fact that favorable conditions generally exist on the southern tack. Raguso researched this route for the time when the voyage actually occurred and found that favorable conditions would have in fact obtained had the vessel proceeded along that route.

Raguso also researched the weather encountered by two other Lykes vessels which had made bunkers stops in San Pedro on the way to the Far East from the Panama Canal. He found that the Dolly Thurman had encountered heavy winds in the Gulf of Tehuantepec in late March, 1978, as it made its way toward San Pedro, and that the Brinton Lykes had encountered unfavorable conditions in April, 1978, soon after leaving San Pedro. (Tr. at 88-93). In Raguso's opinion, had these vessels taken a more direct and ordinary route from the Panama Canal to the Far East, they would not have encountered such unfavorable weather. (Tr. at 93-94).

GE's next witness, Charles Kohler, Jr., a bunkers broker for approximately thirty years, testified that bunkers were readily available in the Gulf ports of the United States as well as in the ports of Balboa and Cristobal, Panama, in April and May of 1978. Kohler also testified that in his years as a bunkers broker he had never been asked by a liner service operator to acquire bunkers at a port that was not a regularly scheduled port of call for the particular line. Kohler believed that the reason that liner operators do not seek bunkers at ports other than ports of call is that they ordinarily are emphatic that the vessel not be delayed and a diversion for bunkers would normally delay the vessel. (Tr. at 145-46). Kohler further stated that it is not the custom for berth line operators not to advertise their bunkering stops since they take on bunkers at their ports of call. (Tr. at 148).

Captain Richard Patterson, a former master with United States Lines with over fifty years of maritime experience, testified that in his opinion the locomotives aboard the Nancy Lykes were not properly secured because only five or six chains of five ton capacity each were tied around the locomotive creating only a thirty ton restraining capacity while the locomotives weighed fifty-two to fifty-three tons each. He expressed the opinion that the locomotives should have been secured with more chains and that the chains should have been crossed to create a diagonal or horizontal restraint. (Tr. at 168). Patterson also testified that, in view of the on deck cargo being carried, he would have protested directions to take a more northerly route to Kobe if he had been the vessel's master. He stated that the time saved by alternative routes would have made up for any savings in bunkers costs gained by bunkering at San Pedro. Patterson stated, finally, that on two voyages out of six he had made along the coast of California in the spring, he encountered Santa Anna winds.

The remaining GE witness, Dale Werner, manager of cost estimating and analysis for GE, testified that the two identical replacement locomotives provided to make up for the lost locomotives cost $1,638,000 to produce and $71,000 to ship.

II.

Lykes contends that it is customary for liner services to stop for bunkers in ports that are not advertised in their published itineraries; that Lykes established a custom beginning in 1978 of using San Pedro as a bunkers only port; that the bill of lading liberty clause encompassed such a step; that the locomotives were properly secured on the deck of the Nancy Lykes; and that the diversion to San Pedro did not involve a substantial risk of encountering unfavorable weather.

Ralph Lacher, assistant manager of Lykes' operating division, testified that on a few occasions in his past experience on liner service vessels he had stopped for bunkers at ports not advertised as ports of call. According to Lacher the decision to use San Pedro as a bunkering stop for Lykes' liner service

vessels going from the Gulf to the Far East was made in early 1978 because at that time it became clear that San Pedro had the lowest cost bunkers. The first such vessel to stop there was the Dolly Thurman in March, 1978, followed by the Brinton Lykes in late March and the Nancy Lykes in early May. Ten additional Lykes vessels made the stop after the Nancy Lykes in 1978, 21 in 1979, and 50 in 1980. Approximately $25,000 in fuel costs were saved by the Nancy Lykes by bunkering at San Pedro. (Tr. at 216-30).

William Kaciak,[2] Lykes' weather routing expert and the actual weather router utilized for the voyage of the Nancy Lykes at issue, disagreed with Raguso's testimony in critical respects. First, he testified that gales in Gulf of Tehuantepec are infrequent and, in any event, are forecastable two days in advance. Relying on data from the Climatological and Oceanographic Atlas, compiled by the United States Weather Service and the United States Hydrographic Office, Kaciak estimated the frequency of force 7, or near gale, winds in the area at about 4 percent in March (the month of the Dolly Thurman voyage), and the frequency of force 8, or gale, winds in March at about 1 percent. In April, he estimated the probability at two percent for force 7 winds and zero percent for force 8 or greater. He estimated that in May the probability was one percent for force 7 winds and zero percent for force 8. (Tr. at 273-76).

Second, Kaciak disagreed that the Nancy Lykes encountered Santa Anna, Chinook or Bora winds and expressed the view that the vessel had encountered "jet effect" winds. (Tr. at 278-80). He estimated the frequency of gale force winds off the coast of California at less than one percent for the months of April and May. (Tr. at 284-85).

Kaciak disagreed with Raguso that a one half of one percent probability of adverse weather was sufficient to warrant con-

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2 Kaciak owns and operates Weather Routing, Inc., which routes for shipping companies. The company was a pioneer in the weather routing service. In addition, Weather Routing, Inc., employed Raguso from approximately 1961-1965.

sideration of a different route, stating that even in the calmest regions the odds of encountering unfavorable conditions are likely to be that high.

Finally, Kaciak differed from Raguso that a reliable estimate of the probability of weather events could be gleaned from the Mariner's Log because, he stated, the publication's data depends on ships' reports and is necessarily incomplete. He asserted that his estimates for the probabilities of weather events rested on publications containing more complete data going farther back in time.

Kaciak testified that the particular route chosen for the Nancy Lykes from San Pedro was a relatively northern route because, in light of the cargo on deck, it was imperative that the vessel head into any wind so that rolling could be avoided. He conceded that his company miscalculated the movement of the winds and had expected them to move south more quickly. However, Kaciak disagreed with Raguso's theory that a vessel should be routed according to statistical weather patterns. He stated that the preferable method of routing is to consider the particular conditions existing at the particular time the routing decision is made. Kaciak testified that he would not have routed the Nancy Lykes from the Panama Canal along a southern route, as Raguso recommended, because at the time storms were predicted in the area. To avoid the northerlies he would have chosen the northern portion of the region described by Raguso as the ordinary area for voyages to the Far East for the first part of the voyage, and would then have routed the ship in a northerly direction. (Tr. at 304).

Lykes' final witness, Captain Robert Wall, a transportation consultant and former commander of a liner service vessel for Farrell Lines, testified to instances where liner service vessels he mastered or managed stopped for bunkers at ports that were not advertised ports of call, and asserted that it was customary for liner services to do so. He testified that it would be confusing for a liner service to advertise as a port of call a port which was to be used for bunkers only since cargo shippers would mistakenly expect the port to be available for cargo pick-up or delivery. Finally, Wall stated that the National

Cargo Bureau Certificate of Inspection which was issued to the Nancy Lykes after the locomotives were loaded was generally relied on to confirm proper stowage within the maritime industry.

III.

GE has failed to establish that the locomotives were not properly secured on the deck of the Nancy Lykes. The only evidence presented on this point was Patterson's opinion that more chains should have secured the locomotives. This conclusion, however, is contradicted by the National Cargo Bureau Certificate of Inspection which followed an actual inspection of the locomotives on deck. It is undisputed that this Certificate is generally relied on in the maritime industry to establish proper stowage.

GE has established, however, that the decision to proceed to San Pedro for bunkers was unreasonable. It is undisputed that sufficient bunkers were available in the Gulf ports and in the Panama Canal ports to carry the vessel to Kobe. It is also clear that the ordinary and customary trade route from the Panama Canal to the Far East is within the area described by Raguso. This conclusion is confirmed by the testimony of Kaciak that, if he had been asked to route the vessel from the Panama Canal to Kobe, rather than from San Pedro to Kobe, he would have recommended a course on the northern portion of the area described by Raguso, at least for the first part of the voyage. Moreover, the evidence established that vessels on liner service ordinarily take bunkers at an advertised port of call. Most importantly, we are persuaded that the diversion to San Pedro created an increased risk that unfavorable weather would be encountered. Raguso and Kaciak agreed at least that the statistical probability of encountering gale or near gale winds, of whatever variety or designation, increases in the springtime in the region the more northerly one goes from a latitude of approximately 30 degrees. By leaving from San Pedro rather than the Panama Canal, the vessel was assured of passing through the region north of 30 degrees whatever

routing was chosen from San Pedro. Furthermore, we accept Raguso's estimate that the statistical probability of gale winds during this time of year is approximately 5 or 6 percent off the coast of California since, in addition to the expert testimony of the weather routers, every mariner with experience on these seas who testified acknowledged that gale or near gale northerly winds are known among mariners to occur in the region in the winter and spring months. Accordingly, we find that whatever the precise percentage of increased probability of unfavorable weather, the decision to go to San Pedro created a significantly greater risk of encountering unfavorable weather. Indeed, the two prior Lykes' vessels which made the San Pedro stop prior to the Nancy Lykes both encountered such weather, one from Gulf of Tehuantepec winds, the other from winds off the coast after departing from San Pedro. At the least, this prior experience should have forewarned Lykes of the potential dangers in diverting to San Pedro.

Moreover, while it has not been demonstrated that the locomotives were improperly stowed on deck, the fact that such weighty cargo was being carried on deck should have been a significant consideration militating in favor of a route on the calmest seas possible. By directing the vessel to take on bunkers at San Pedro, Lykes foreclosed safer options and thrust the vessel into areas where the probability was increased that unfavorable weather would be encountered. This added risk of damage or loss to cargo solely for the benefit of the vessel must be deemed unreasonable. Indeed, there is no evidence that Lykes considered any factor other than its fuel cost savings in directing its vessels to take on bunkers at San Pedro.

Lykes' contention that the stop at San Pedro was not a deviation in light of the broad liberty clause contained in the bill of lading is unpersuasive. Paragraph III of the applicable bill of lading defines the permissible scope of the voyage as including "usual, customary or advertised ports, whether herein named or not, and ports in or out of the advertised, geographic or usual route or order . . ." In reference to a similarly broad liberties clause it has been noted that "[i]t

would seem hard to deviate from such a voyage." Gilmore & Black, The Law of Admiralty, 178 (2d ?? 19??). Such a construction would undercut the policy and statutory provisions forbidding a carrier from contracting out of liability for his own wrongdoing and would be inconsistent with § 3(2) of the Carriage of Goods by Sea Act ("COGSA") which imposes upon the carrier a duty to ". . . properly . . . carry the goods." *Id.* at 178. Furthermore, § 4(4) of COGSA implies as clearly as possible that any unreasonable deviation is to be treated as a breach of the Act and the contract of carriage:

> "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers as it shall, prima facie, be regarded as unreasonable.*" [Emphasis supplied]

Indeed, § 4(4) confirms that a carrier may not define the voyage in such broad language as to render it impossible for any deviation to be found no matter how far the vessel wanders from the specified route. Lykes' proposed construction of the liberty clause is at odds with § 4(4)'s concept of reasonable and unreasonable deviations. The liberty clause must therefore be construed to permit only reasonable deviations from the anticipated journey. *Id.* at 179. Moreover, the reasonableness of the deviation may not be judged merely from the point of view of the carrier. As § 4(4)'s proviso suggests, the carrier may not justify a deviation merely because it was to his benefit. "The carrier, throughout the performance of the voyage, is always subject to the Section 3(2) duty to care for and carry the goods properly, and his decision on a route would seem to be improper and unreasonable whenever it is made in disregard of that duty." *Id; see Spartus Corp. v. S.S. Yafo*, 590 F.2d 1310 (5th Cir. 1979); *Encyclopedia Britanica Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 18 (2 Cir. 1969), *cert. denied*, 397 U.S. 964 (1970).

Nor are we persuaded that Lykes' prior stops at San Pedro rendered that practice "customary" so that the Nancy Lykes' stop was not a deviation or was a justified deviation. The evidence established that, at least for liner services, bunkers are ordinarily secured at one of the ports of call advertised in the Journal of Commerce. Indeed, Kohler, in his long experience as a bunkers broker, had never been asked by a liner operator to secure bunkers in a port that was not an advertised port of call. Despite GE's evidence of instances where such stops were made, it is clear that, at the least, such stops are extraordinary for liner service vessels.

Similarly, Lykes' contention that the stop at San Pedro was a customary one for vessels going to the Far East is without merit. Lykes relies on the facts that, prior to the Nancy Lykes, it had directed two other vessels to stop at San Pedro for bunkers and that it used San Pedro frequently in the years following, as did other lines. However, the critical element as to "custom" in the cases relied on by Lykes is the knowledge on the part of the *shipper* that a particular port was a customary port for the voyage. *See, e.g., W. R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha,* 12 F.2d 519 (9th Cir. 1926); *The Frederick Luckenbach,* 15 F.2d 241 (S.D.N.Y. 1926); *The San Guiseppe,* 122 F.2d 597 (4th Cir. 1941). Of course, where the shipper has knowledge that a particular stop will be made and consents either explicitly or implicitly, as in the cited cases, the particular stop can hardly be labeled a deviation from the contemplated voyage. In such circumstances, the shipper is logically held to have consented to any greater risks to his cargo imposed by the additional stop. By contrast, in the present case there were only two such diversions before the voyage in question; regardless of the later practice of Lykes or other liner services, knowledge on the part of GE that Lykes would be bunkering at San Pedro cannot be inferred, and all the evidence indicates that GE did not in fact know that such a stop was planned. In these circumstances, GE cannot be held to have consented to whatever added risks that were occasioned by the San Pedro deviation. In addition, in light of the finding that liner services ordinarily only bunker at advertised

ports of call and that the ordinary trade route to the Far East from the Panama Canal is significantly further south than San Pedro, it cannot be said, as in *The San Guiseppe, supra,* that the bunkering stop was merely ancillary to the contemplated voyage.

In sum, the stop of the Nancy Lykes at San Pedro for bunkers was a deviation from the ordinary route for a liner service vessel since San Pedro was not an advertised port of call and was not along the ordinary trade route from the Panama canal to the Far East. In light of the fact that the deviation exposed the vessel to significantly greater risks of adverse weather, and was made solely for the benefit of the vessel, it was unreasonable. As an unreasonable deviation, the vessel is liable for any damage to cargo caused by the diversion and recovery is not limited to the $500 per package limitation contained in the Bill of Lading and in COGSA.

Accordingly, GE is entitled to recover the $1,709,000 it cost it to replace the locomotive cabs lost overboard.

Submit judgment.

Dated: New York, New York
April 15, 1982

s/Morris E. Lasker
U.S.D.J.

Appendix C

C1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 3348 (MEL)

GENERAL ELECTRIC COMPANY
INTERNATIONAL SALES DIVISION,

Plaintiff,

—against—

SS "NANCY LYKES", her engines, boilers, etc., and
LYKES BROS. STEAMSHIP CO., INC.,

Defendant.

JUDGMENT

The issues in the above-entitled action having been brought on regularly for trial, before the Honorable Morris E. Lasker, United States District Judge, on September 22, 1981, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on April 15, 1982, having handed down its decision, constituting its findings of fact and conclusions of law, and the Court having found in favor of the plaintiff, it is:

ORDERED, ADJUDGED and DECREED, That plaintiff, General Electric Company International Sales Division, have judgment against defendant, Lykes Bros. Steamship Company, Inc., in the amount of $1,709,000.00, with interest at 12% from May 20, 1979 until date of judgment, exclusive of the

period from April 15, 1979, until June 13, 1980, and costs to be taxed.

Dated: New York, New York
August 11, 1982.

MORRIS E. LASKER
U.S.D.J.

JUDGMENT ENTERED 8/13/82

RAYMOND F. BURGHARDT
Clerk

Appendix D

§ 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

Apr. 16, 1936, c. 229, § 1, 49 Stat. 1208.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

April 16, 1936, c. 229, § 2, 49 Stat. 1208.

§ 1303. Responsibilities and liabilities of carrier and ship

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c), of this section: *Provided,* That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date

when the goods should have been delivered: *Provided,* That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided,* That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.

§ 1304. Rights and immunities of carrier and ship

Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive, or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.

§ 1305. Surrender of rights; increase of liabilities; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Apr. 16, 1936, c. 229, § 5, 49 Stat. 1211.

§ 1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Apr. 16, 1936, c. 229, § 6, 49 Stat. 1211.

§ 1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Apr. 16, 1936, c. 229, § 7, 49 Stat. 1212.

§ 1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

Apr. 16, 1936, c. 229, § 8, 49 Stat. 1212.

§ 1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

Apr. 16, 1936, c. 229, § 9, 49 Stat. 1212.

§ 1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained

or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Apr. 16, 1936, c. 229, § 11, 49 Stat. 1212.

§ 1311. Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Apr. 16, 1936, c. 229, § 12, 49 Stat. 1212.

§ 1312. Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided*

further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

Apr. 16, 1936, c. 229, § 13, 49 Stat. 1212; Proc.No.2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.

§ 1313. Suspension of provisions by President

Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamaton.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

Apr. 16, 1936, c. 229, § 14, 49 Stat. 1213.

§ 1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period

not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

Apr. 16, 1936, c. 229, § 15, 49 Stat. 1213.

§ 1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

Apr. 16, 1936, c. 229, § 16, 49 Stat. 1213.

Appendix E

Clauses Excerpted From the Bill of Lading

3. The scope of the voyage herein contracted for shall include usual, customary, or advertised ports, whether herein named or not, and ports in or out of the advertised, geographical, or usual route or order, even though in proceeding thereto the ship may sail beyond the port of discharge, or in a direction contrary thereto, or return to the original port, or depart from the direct or customary route the ship may call at any port for purposes of the current, prior or subsequent voyages, may omit calling at any ports, scheduled or not, may call at the same port more than once, and for matters occuring before loading the goods, known or unknown at the time of loading, or occuring after loading, with or without the goods or passengers on board, and before or after proceeding toward the port of discharge, may adjust compasses, dry-dock, with or without cargo aboard, go on ways or to repair yards, shift berths, make trial trips or tests, take fuel oil, or stores, remain in port, sail with or without pilots, tow and be towed, and save or attempt to save life or property; and all of the foregoing are included in the contract voyage.

It is expressly agreed that, in all ports or places where, by local law or custom, such a stipulation is permissible, neither the carrier nor its agent shall be liable for loss or damage to the goods before loading on or after discharge from the vessel.

The carrier shall not be responsible in any capacity whatever for any delay, or loss of, or damage to the goods occuring while the goods are not in the actual custody of the carrier.

Carrier does not undertake, and is not required, to deliver the goods at any particular time, or in time for any particular purpose, and shall not be liable for loss or damage resulting from earlier or delayed arrival of the goods.

7. If this Bill of Lading covers containers, shipper, consignee, and all holder of the Bill of Lading, expressly grant Carrier permission to carry such containers, without notice on

this Bill of Lading or otherwise, on deck; and, when containers are so carried, Carrier shall not be required to note that fact on this Bill of Lading, any custom to the contrary notwithstanding.

In respect of goods carried on deck, all risks of loss or damage by perils inherent in such carriage shall be borne by the shipper or consignee, but in all other respects the custody and carriage of such goods shall be governed by the terms of this Bill of Lading, and the provisions stated in the Carriage of Goods by Sea Act, notwithstanding Section 1(c) thereof, or the corresponding provision of any carriage of goods by sea act which may be applicable.

26. Neither the Carrier nor the ship shall in any event be or become liable for any loss or damage to the goods in an amount exceeding $500 per package, or in case of goods not shipped in packages, per customary freight unit, unless the nature and value of such goods have been declared by the shipper before shipment; and inserted in this Bill of Lading, and extra freight paid if required. This declaration shall be prima facie evidence, but shall not be conclusive on the Carrier. In no event shall the Carrier be liable for more than the amount of damage actually sustained.

Where containers, vans, trailers, portable tanks, palletized units, and other such packages are not packed by the Carrier, each individual such container, van, trailer, portable tank, palletized unit, and other such package, including in each instance its contents, shall be deemed a single package, and Carrier's liability limited to $500 with respect to each such package.

Whenever the value of the goods is less than $500 per package or other customary freight unit, their value in the calculation and adjustment of claim for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid whether any other value is greater or less.

Form 2561 4/74 INTERMODAL

LYKES BROS. STEAMSHIP CO., INC.

INTERMODAL BILL OF LADING

SHIPPER/EXPORTER

O/S GENERAL ELECTRIC COMPANY
INTERNATIONAL SALES DIVISION
570 LEXINGTON AVENUE
NEW YORK, NEW YORK

BY NO.

EXPORT REFERENCES

CONSIGNEE

ORDER OF: CENTRAL TRUST OF CHINA
PROCUREMENT DEPARTMENT ON
BEHALF OF TAIWAN RAILWAY
ADMINISTRATION

FORWARDING AGENT - REFERENCES - FMC NO.

FMC-916 EM 12223 VG J D SMITH INTER-OCEAN INC. 1 WORLD TRADE CENTER, NYC

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY

TAIWAN RAILWAY ADMINISTRATION
NO. 2 YEN PING NORTH ROAD
SECTION 1
TAIPEI, TAIWAN
(WITHOUT LIABILITY TO CARRIER, SEE CLAUSE 17 HEREOF)

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

U.S. DOMESTIC ROUTING PER LYKES TARIFF #

PIER OR AIRPORT

ERIE, PA.

EXPORTING CARRIER VESSEL — AMERICAN FLAG — PORT/POINT OF LOADING

NANCY LYKES — ERIE, PA.

PORT/POINT OF DISCHARGE

KEELUNG

ONWARD INLAND ROUTING

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
CTC FL2-611332 74 FL2/1424 TAIWAN RAILWAY ADMIN PT KEELUNG 818510		FREIGHT PREPAID LOADED ON DECK AT RISK OF THE GOODS.		
# 121/123	3	SKIDS: ELECTRIC LOCOMOTIVE	204,900	8223.00
# 124/126	3	SKIDS: ELECTRIC LOCOMOTIVE	204,900	8223.00
# 127/129	3	SKIDS: ELECTRIC LOCOMOTIVE	204,900	8223.00

EXIMBANK CREDIT NO. 5274

CTC INVITATION NO FL2-611332 AND
CTC CONTRACT NO. 74-FL2-1424 PART "A"
SELLERS CONTRACT NO. INTSD-818510
PART "A".

THESE COMMODITIES LICENSED BY U.S. FOR ULTIMATE DESTINATION TAIWAN. DIVERSION CONTRARY TO U.S. LAW PROHIBITED.

INTERMODAL BILL OF LADING
SHIPPER AND/OR CONSIGNEE TAKE SPECIAL COGNIZANCE OF INTERMODAL TRANSPORTATION CLAUSE ON REVERSE HEREOF

COPY
NOT NEGOTIABLE
PREPAID

TOTAL CHARGES

FREIGHT PREPAID - TO COLLECT

IN ACCEPTING THIS BILL OF LADING, any local customs or privileges to the contrary notwithstanding, the shipper, consignee and owner of the goods agree to be bound by all of its stipulations, exceptions, and conditions, whether written, printed or stamped on the front or back hereof, as fully as if they were all signed by said shipper, consignee and owner of the goods, such stipulations, exceptions and conditions to apply in every contingency, wheresoever and whensoever occurring and also in the event of deviation, or of unseaworthiness of the ship at the time of loading or inception of the voyage or subsequently.

IN WITNESS WHEREOF, there have been executed 3 Bills of Lading exclusive of non-negotiable copies, all of the same tenor and date, one of which being accomplished, the others to stand void.

DATED AT NEW YORK APR 16 1978
Place Date

BY LYKES BROS STEAMSHIP CO., INC.

BY
CONTRACT NO. [redacted] B/L NO 15

Excerpt from Joint Exhibit 17—"Amendment 13A to the contract between General Electric Company and Taiwan Railway Administration"

6. The money received from insurance claims related to the loss of the two (2) bodies shall be promptly turned over to the Seller and retained by the Seller. Buyer agrees to reasonably assist Seller in filing, pursuing and settling the claims. The Seller will provide the Buyer with evidence that the money has been received and the date of the receipt as well as the amount thereof.

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No. S. 14694 (16) 1204-1204 bm

CERTIFICATE OF LOADING COVERING SPECIFIC CARGO

— OF —

NATIONAL CARGO BUREAU, INC.

Issued, as to dangerous cargo and grain in bulk, under authority of the United States of America, Commandant, United States Coast Guard, pursuant to (1) the provisions of the International Convention for the Safety of Life at Sea, 1960; (2) the provisions of section 4472, Revised Statutes, as amended (46 U. S. C. 170 (7) (a)); (3) the provisions of section 4417, Revised Statutes, as amended (46 U. S. C. 391); (4) the Magnuson Act of August 9, 1950, amending the Espionage Act (50 U. S. C. 191a); and (5) the provisions of the Act of July 5, 1884, as amended (46 U. S. C. 2) and of section 4403, Revised Statutes, as amended (46 U. S. C. 372).

NEW ORLEANS, LA 4/16 19 TC

This is to Certify, *That in connection with the loading of the specific cargo hereinafter mentioned the* U.S.A. S.S. NANCY LYKES *whereof* K.W.CAMERON

(flag) (Name of Vessel)

is Master, of 5046 *Net Tons, built at* MARYLAND *in* 1961,

said to be bound for FAR EAST

has been under the inspection of a surveyor or surveyors of NATIONAL CARGO BUREAU, INC. at this port from time to time during the course and in respect of the loading of cargo hereinbelow specified; that so far as said cargo came under the observation of such surveyor or surveyors, the stowage was in accordance with the recommendations of National Cargo Bureau, Inc. and the stowage of dangerous cargo and of grain in bulk was also in accordance with the regulations of the Commandant, United States Coast Guard.

THIS CERTIFICATE IS NOT A CERTIFICATE OF SEAWORTHINESS AND RELATES ONLY TO THE FOLLOWING CARGO.

FOLLOWING DECK CARGO SAID TO BE 59/45 1-40' EX.BOARD(SAID TO CONTAIN)13.8
4 P/S & SC. OF HATCH 61/47 1-40' (SAID TO CONTAIN) 15.7
3 LOCOMOTIVES 162.0 68/48 1-40' " " 15.6
3 PORT 60/46 1-40' " " 15.3
1 PC.VESSEL 16.0 51/37 1-40' " " " 15.4
1 PC. 13.0 49/35 1-40' " " " 15.0
P.S. 29 1-20' CONT.GRANULES(SAID TO CONTAIN)15.7 52/38 1-40'(SAID TO
" 27 1-20' " " " " " 15.3 CONTAIN) 15.2

THE FOREGOING INSPECTION WAS UNDERTAKEN AND THIS CERTIFICATE IS ISSUED ON THE FOLLOWING TERMS AND CONDITIONS:

UNDERSIDE DECKLOAD

UNDERSIDE CERTIFICATE ISSUED A-63712

While the Officers, Directors and Committees of National Cargo Bureau, Inc. use their best endeavors to see that the functions of the Bureau are properly executed, the Bureau makes no warranty of any kind, either express or implied, including warranty of workmanlike service, respecting its work or services, and is not an insurer of cargo or other property or of the ship or of the safety of any personnel and disclaims all legal responsibility for any loss, damage, personal injury or death resulting from any act, default, omission, negligence, error or breach of any said warranties. Neither the Bureau nor its Officers, Directors or Committee members nor its surveyors, employees, representatives or agents are under any circumstances whatsoever to be held responsible or legally liable for any inaccuracy or error in any report or certificate issued by the Bureau or by its surveyors or other agents or employees, or for any error of judgment, default, omission, negligence or breach of warranty, either express or implied, including warranty of workmanlike service, arising or allegedly arising out of services of the Bureau, its surveyors or other employees, representatives or agents. This certificate covers only the cargo herein described as having been loaded at place of issuance of this certificate, and under no conditions is it to be deemed to cover any other cargo whether loaded at place of issuance of this certificate, or any other port, nor to cover the maintenance, operation or supervision of the vessel or her personnel at any time. This certificate shall not be valid if upon sailing from any loading port and/or any fueling port and/or during any part of the voyage, the vessel's draft shall exceed that permitted by the law of her flag and/or the draft designated for the vessel in the Classification Society in which she may be classed.

AGENT — LYKES BROS.S.S.CO.,INC. -

FEE $ 30.00 SCH 1.2

ADD'L CHGS. (if any) _____

EXPENSES _____

TOTAL $ 3 .00

M. DIXON Surveyor.

Rev. 1/77

E6

S/S NANCY LYKES

Hypothetical distances and times of passage, based on a speed of 16.0 knots, from PANAMA, CANAL ZONE, to KOBE, JAPAN, during the months of APRIL/MAY.

Distances are from "H.O. PUB. 151, DISTANCES BETWEEN PORTS".

	From/To	*Route*	*Distance*	*Time*
	PANAMA TO KOBE.	G.C.	7964	20d 18h
	PANAMA TO LOS ANGELES	Coastal	2913	7d 14h
	BUNKERING IN LOS ANGELES			0d 15h
	LOS ANGELES TO KOBE	G.C.	5185	13d 12h
*	LOS ANGELES TO HONOLULU	R.L.	2228	5d 19h
**	HONOLULU TO KOBE	(S'n route)	3550	9d 6h
***	PANAMA TO HONOLULU	G.C.	4685	12d 5h

EXPLANATION: The distances to and from HONOLULU were used for convenience and a fixed point from which to estimate distances to and from the HAWAIIAN ISLANDS.

* A vessel from LOS ANGELES TO KOBE, via the HAWAIIAN ISLANDS, would most likely pass west of the island of OAHU, on which HONOLULU is located.

** A vessel, after passing west of OAHU, would clear the islands of KAUAI and NIIHAU, then follow the southern route to KOBE.

*** A vessel following a G.C. course from Panama to the HAWAIIAN ISLANDS, thence to KOBE, would probably pass either north or south of the island of HAWAII and then establish on the southern route to KOBE.

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Excerpt from trial testimony of Dale Werner

[33]

* * *

MR. COSTELLO: If your Honor pleases, by way of explanation, originally the suit was for what the original cost was to them and then it was only just at the—approximately four weeks ago I was notified that there was a change in the amount of the suit from $1,075,000 to $1,638,000. I said that I had no objection to them amending the wherefore clause because I am sure the court would allow such amount, but at this time we were on the eve of trial and that's the reason, by way of explanation, many of these things I am possibly going into now is the reason I am going into them.

THE COURT: I understand it, although it would have helped if we could have done it earlier.

MR. CONE: The notification was, to the best of my recollection, at least two months ago, number one.

Number two, the reason the suit was started for the amount that it was started for was that that amount represented the underwriter's payment to GE and it wasn't until two months ago that we were able to cut through all the red tape at GE and get ahold of the people who were actually responsible concerning the **[34]** replacement and get a figure on it, but we told all this to Mr. Costello.

Excerpt from trial testimony of Robert Raguso

[84]

* * *

Q. Would you tell us what the weather was in that corridor for the springtime of the prior ten years?

* * *

A. We looked solely for the month of May and looked at the Mariner's Weather Logs to identify the frequencies of gales in this particular corridor for any month of May. We did it for 1977, '76, '75, all the way back to 1969, and there were some 704 hours of observed and reported gales out of some 6,696 hours **[85]** respectfully in each of the months.

THE COURT: Excuse me, that is confusing. It sounds to me as if there were more gales than there were hours.

THE WITNESS: No, there are 704 hours of gales as opposed to 6,696 hours in each of the respective Mays, so in a word, you are pretty close to about a 10 percent incidence of gales in this corridor.

THE COURT: Slightly higher.

A. If you reduce your corridor and not discuss any of the orient coast or the more northerly reaches of this corridor, and just look at the California coast, a conservative figure would certainly be a five to six percent incidence of gales in any month of May for the previous ten years.

* * *

[110]

* * *

Q. From the Panama Canal to Kobe by that route how many nautical miles would the vessel be going?

THE COURT: We are talking now about the southernmost route on Exhibit 14-A, Joint 14-A?

MR. COSTELLO: Yes.

A. I did a distance calculation which approached 8,589 miles.

THE COURT: That's miles?

THE WITNESS: Yes, sir. 8,589 nautical miles.

THE COURT: That's from Panama to Kobe?

THE WITNESS: By way of a track south of Honolulu.

* * *

[112] Q. From the pilot charts you indicate how much mileage the vessel would have gone if it went from the Panama Canal up to San Pedro and then from San Pedro to Kobe by the great circle route.

A. I have another track on here which is the actual track. Is that the one you mean, sir, the actual track, which includes a segment of the great circle and then, of course, the Nancy Lykes came down to 35 latitude, but I have a distance tallied from that because that's available in the deck logs.

THE COURT: Let's have that and if Mr. Costello wants more he can can ask it?

A. 8,464 nautical miles. 8464.

Q. That would be the actual track to San Pedro and then from San Pedro to Kobe, is that correct?

A. Yes, sir.

THE COURT: So in fact the difference in miles is insignificant, isn't it?

THE WITNESS: Insignificant? Yes.

* * *

[130] Q. Were you aware of how many vessels bunkered at the San Pedro Long Beach facility in May of 1978?

A. I am aware of it. I don't have the data in front of me, but we did a research task on this very issue.

THE COURT: For this case or other purposes?

THE WITNESS: For this case. It was one of the tasks given to us by Mr. Cone. I don't have the data in front of me at this time.

Q. Does 627 vessels sound like about what there were?
A. Can I refer to my notes?
Q. Absolutely. Sure.

MR. CONE: I have your notes here if you want them. Do you want this?

THE WITNESS: Yes, please.

In May of '78, total calls at the port, 607. Vessels called which included bunkers, 440. Vessel calls for bunkers only, 205.

THE COURT: What was the total?

THE WITNESS: 607 made a call at the port of Los Angeles Long Beach, but of that 440 included bunkers in the call.

* * *

[127] Q. Isn't that what you were talking about, the gales that come down through the Gulf of the Tehuantepec and come out across the sea from the Gulf itself—

A. That is.

Q. When you refer to those two vessels?

A. No, I referred to the Gulf of Tehuantepec gale for the toll Dolly Turman. I referred to the storm track incidents and the frontal passage at mid-ocean for the Brinton Lykes.

* * *

Excerpt from trial testimony of Charles E. Kohler, Jr.

[150]

* * *

Q. Specifically as to this particular voyage, there came a time when the San Pedro became what you might term in the United States a cheap bunkering port, correct?

A. That's true.

* * *

Excerpts from trial testimony of Ralph Lacher

[217]

* * *

Q. And after making that decision did there come a time when a vessel from Lykes Bros. on this particular service stopped for bunkers only at San Pedro?

A. Yes.

Q. And what vessel was that?

A. I believe the first one was the Dolly Turman.

* * *

[223] Q. I show you Defendants' Exhibit F and Defendants' Exhibit G and will you tell us what they are.

A. F is the Brinton Lykes Master's Voyage Report.

THE COURT: Of what date?

THE WITNESS: This shows she arrived in Long Beach on March 31 and also sailed on the same date, and she arrived from, yes, New Orleans, and she sailed to Kobe after that, took on 10,000 barrels of fuel at Long Beach.

* * *

Excerpt from trial testimony of William Kaciak

[285]

* * *

Q. All right. Would you tell us as a result of the checking which I asked you to do what the frequency would be?

THE COURT: We are talking about gales in general now?

THE WITNESS: Yes, gales right off the California—

THE COURT: Force 8 or higher?

THE WITNESS: Pardon me?

THE COURT: Force 8 or higher?

THE WITNESS: Force 8 or higher.

A. In January—now, I am taking the entire California coast. They have data for 40 north latitude right off the California coast and they have data for 30 north latitude. So I obtain the—and since San Diego is about 34 north latitude you could nearly interpolate bewteen the two to have an approximate percentage. In Jaunary I found at 40 north that there **[286]** was only a little higher than 1 percent chance of gales.

Q. In what month?

A. In January.

Q. Okay.

A. At 30 north it was—it wasn't even measurable. It was less than a half of a percent. So on average at 35 I estimate it would be less than 1 percent chance at San Diego.

In February at 40 north there was 3 percent, at 30 north 1 percent.

Q. And 35 would be just opposite the area we are talking about?

A. 34, approximately 34 north latitude is where we are thinking of.

THE COURT: Excuse me. I didn't get the February figures. 40 was what?

THE WITNESS: 3 percent, and 30 north was 1 percent.

A. In March it was slightly over 2 percent at 40 and slightly over 1 percent at 30.

In April it was 1 percent at 40, zero percent at 30.

In May—

Q. What would you estimate it then to be in **[287]** April at 34 or 35?

A. It's less than 1 percent.

Q. Okay.

A. In May it's 1 percent at 40 and just a trifle—under a half a percent at 30. So again, at 35 I estimate it to be less than 1 percent.

* * *

[290]

* * *

Q. And did you in fact, based on that information, and were you aware of the weather conditions at the time you received this request?

A. Yes, I was aware of the weather conditions, and the day before he sailed, we sent a message to him, and we chose a route, we had thought the wind would be more northwesterly than northerly and we chose a route so that he would be heading into the winds. We had considered more southerly routes, a rhumb line route, and finally we settled on a sort of modified great circle route.

Q. Why?

A. And the reason for that—

Q. I am sorry?

A. Well the reason for the modified circle was, first of all, he would be heading towards a high pressure area, but most important was that he would be heading into the winds, so—

* * *

[309]

* * *

Q. My question is very simple. Did you check any of that information for the last few years to see what the percentage possibility of hitting a weather event of near gale or gale force or greater would have been in the Gulf of Tehuantepec?

A. I checked other sources, and I have no reason on a statistical basis to question this. This data is based on over a hundred years of gathering of information. It's based on the British, Dutch, United States ships, and a variety of other ships. This is over a hundred years of data. Ten years more or less is not going to alter the basic statistics so—

* * *

Excerpt from Deposition of John Scally

[6]

* * *

Q. Can you tell me, sir, by looking at the documents that you brought with you, when for the first time were arrangements made by your Department for the shipment of this particular cargo aboard the S.S. NANCY LYKES, Voyage No. 63?

A. The date?

Q. Yes, sir.

* * *

THE WITNESS: I would like to, perhaps, clarify the date issue and negotiation issue.

[7] Q. Please do.

A. The contract was for 74 locomotives, electric locomotives.

We did our transfer planning before the first unit was exported with a United States, American Flag Carrier operating into the Far East. Lykes Bros. was one of them.

We negotiated a rate arrangement with them. And most of the units, perhaps seventy-five percent of the units, moved under Lykes Bros.

* * *

Q. Mr. Scally, was there an over-all contract, **[8]** aside from separate Bills of Lading, that provided for the shipment of the initial 74 locomotives to Taiwan?

THE WITNESS: Can we go off the record?

MR. KEENAGHAN: Off the record.

(Discussion off the record)

Q. Referring specifically, Mr. Scally, to the relationship between GE and Lykes Bros. Steamship Company, was there an over-all contract for the shipment of a number of locomotives, other than the individual Bills of Lading?

A. No.

Q. I don't mean to put words in your mouth, but is it fair to say that, with regard to the specific shipments of the locomotives, that each Bill of Lading was considered a separate contract?

A. Each Bill of Lading was considered, by their very nature, a separate carriage contract.

* * *

[11]

* * *

Q. What is your understanding of that phrase, "Loaded on deck at risk of the goods"?

MR. CONE: I am going to object, because that is asking, I think, for a legal conclusion. And the statement, I think, speaks for itself. It was loaded on deck.

Q. Is that phrase or statement used in the **[12]** ordinary course of your business, "Loaded on deck at risk of the goods"?

A. I certainly heard the statement before. It is fairly common that large pieces of equipment go on deck.

MR. CONE: I have no objection to a question as to what a phrase like that means, or what that particular phrase means to him, as a witness.

Q. In your position as Manager of the Export Transportation for General Electric, what does that particular phrase mean to you?

A. It means that the steamship company loaded parts of this equipment on deck and that they determined it to be at my risk.

* * *

[14]

* * *

Q. At any particular time were you quoted a rate for under-deck cargo by Lykes Bros.?

* * *

[15] A. (Continuing) The cargo, generically, that you speak of, consists of three pieces.

One is the superstructure, which is the large cab, and two trucks or bogies.

The bogies, or trucks, they are under-deck.

So, if you will stay away from those, I will answer your question.

The question of under-deck is not germane, nor did it come up, because the units physically could not be carried under-deck on the Lykes service.

Q. You are referring now to the cabs?

A. To the cabs, yes.

* * *

[16]

* * *

Q. By the way, the Bill of Lading is printed on a document that bears the heading "Lykes Bros. Steamship Co., Inc., Intermodal Bill of Lading; is that right?

A. Yes.

Q. Where did you get the particular document that your company prepared?

[17] A. Our Freight Forwarder prepared the document, and I have to assume that this is customary of the steamship company—in this case, Lykes Bros.—that they supplied us with the appropriate form.

Q. Who is your Freight Forwarder?

A. As indicated on the Bill of Lading, J. D. Smith Interocean, Inc.

* * *

[19] that you brought with you today, whether this particular voyage was the first one that Lykes Bros. made in connection with the shipment of the locomotives?

A. I can't tell from the documents I brought. But my recollection was that this was the fortieth some-odd units shipped and Lykes Bros. had carried many of the early ones.

* * *

[24]

* * *

Q. You have brought with you a number of other documents. Were these documents prepared by General Electric prior to the loss of the cargo?

A. I don't believe any of the documents we have here have anything to do with anything that happened prior to the loss. Most of this is correspondence after the fact.

MR. CONE: Most of these documents—and you are welcome to look at whatever you want to here—deal with the subrogation, and the ultimate payment made by the underwriter to GE.

* * *

Excerpt from Deposition of Captain Leland Hansen

[48]

* * *

Q. Had you had prior voyages for Lykes Bros through the Canal where the next port of call was to be some port in Japan?

A. Yes.

Q. On those prior voyages, did you have occasion to go to San Pedro?

A. There was a couple of times to bunker.

Q. While you were the master?

A. I believe one time while I was the master, maybe a couple of times when I was on vacation off on vacation.

Q. Were these several or couple of occasions prior to this particular voyage of the Nancy Lykes?

A. They were.

* * *

[50]

* * *

Q. Do you know when you arrived at San Pedro?

A. I arrived at San Pedro at 1424, May 3rd, 1978.

Q. In connection with your voyage from the Panama Canal to San Pedro, what kind of weather did you encounter over or by California?

A. Good weather.

Q. What kind of weather did you encounter **[51]** off the California Coast?

A. Going up?

Q. Yes.

A. Good weather.

Q. Anything unusual encountered off the United States, California Coast?

You can refer to the log if in fact it is in there.

A. On the way up?

Q. On the way up?

A. Moderate weather.

Q. Do you mind if I see the log book that you have in front of you, Captain?

How long wee you in San Pedro?

A. I finished with engines, arrival at San Pedro May 3rd at 1624. Departure to sea San Pedro, 718 on May 4th.

Q. Where did you berth?

Was that berth 97?

A. That's right.

Q. And whose facility is that?

A. Mobile Oil Terminal.

Q. Did you have an agent in Los Angeles or San Pedro at that time?

* * *

[69]

* * *

Q. At what point in time was the cargo loss experienced?

A. On the fifth at 4:30 at approximately 4:30.

Q. May 5th, is that correct?

[70] A. That's correct.

* * *

Q. How much cargo was lost over the side?

A. There were two locomotives.

There was a container stove in with its contents missing, if I remember, and another container stoved.

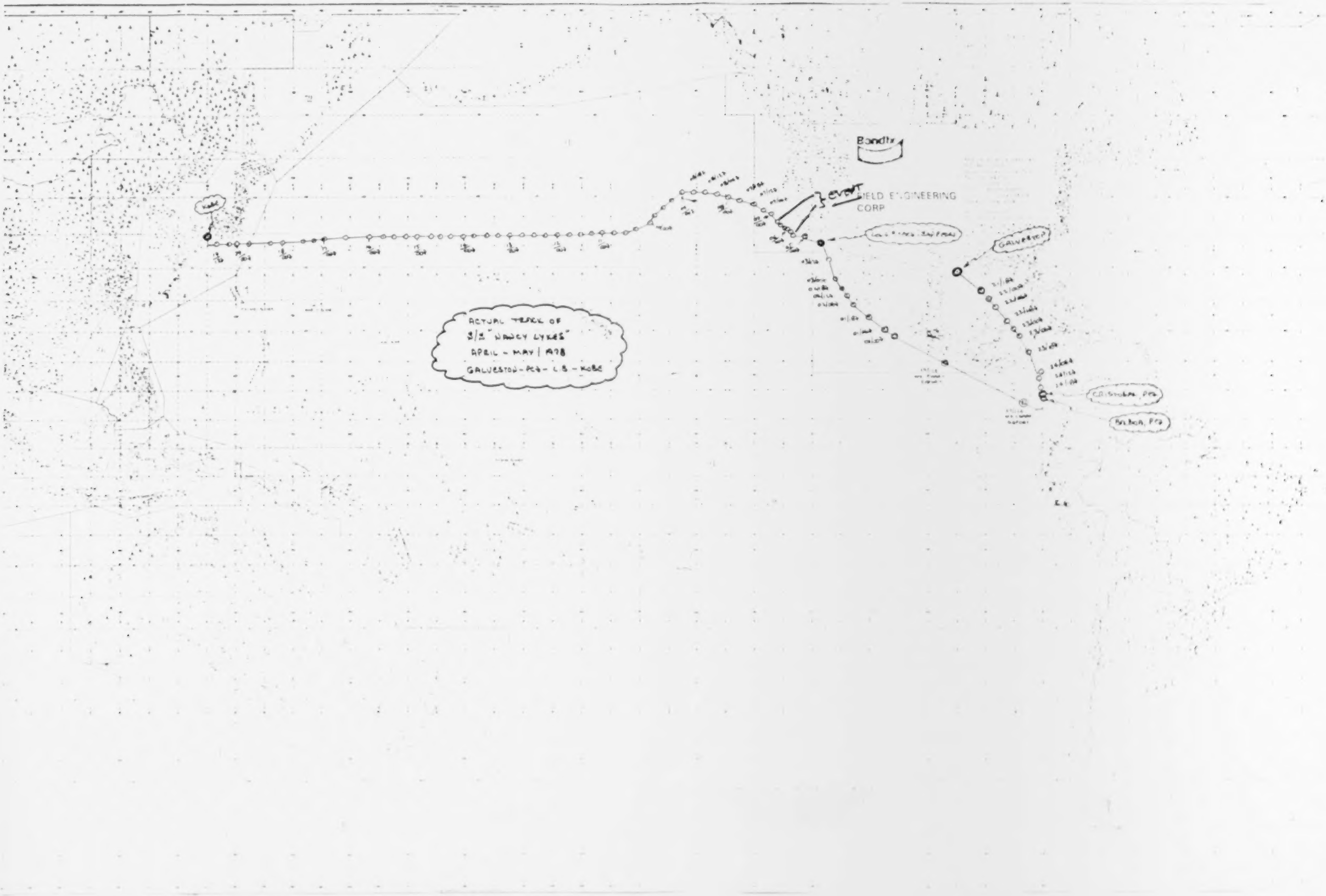
* * *

Vessel's Reconstructed Track

[See foldout on following page.]

Joint 7

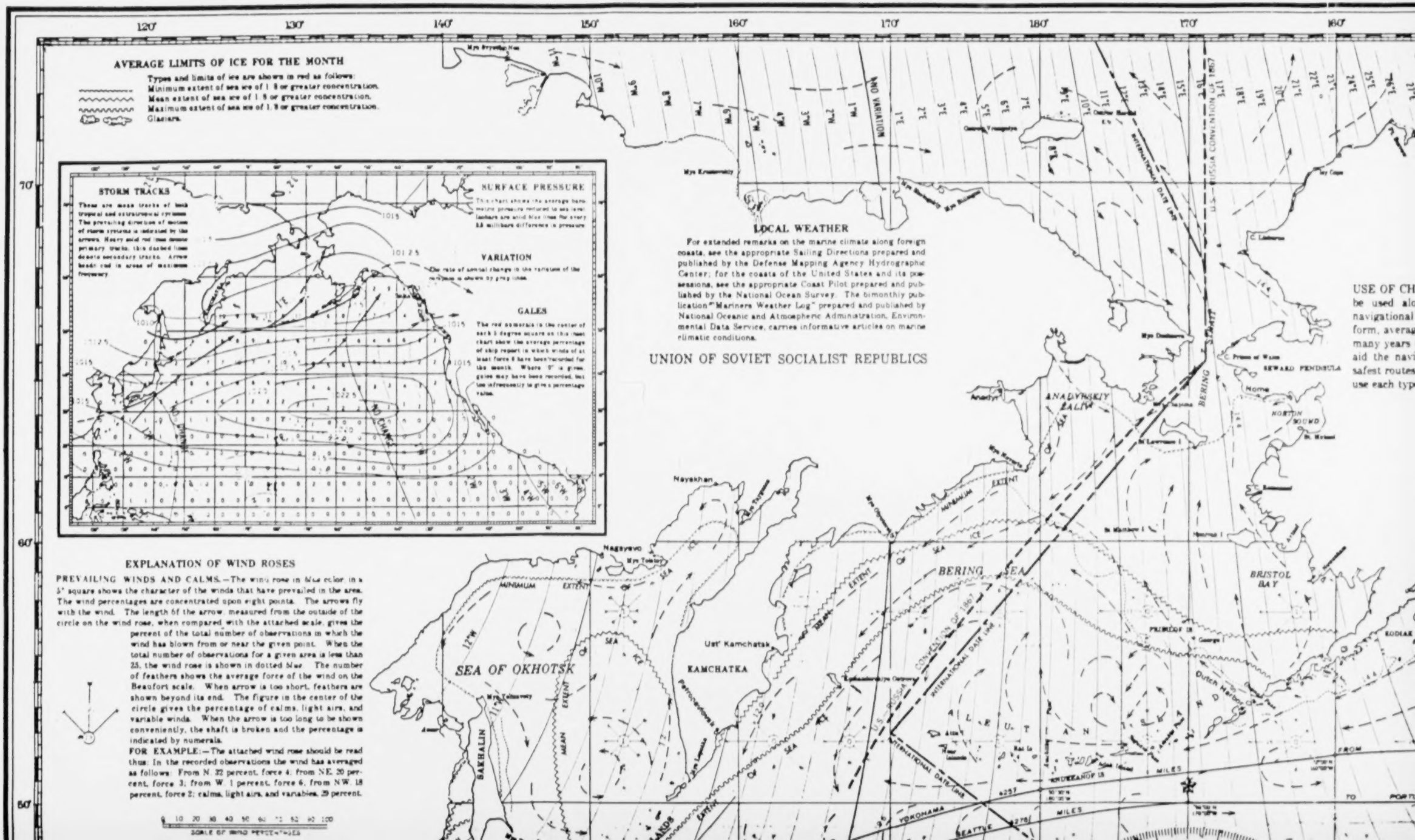
Page 2 of 2



Pilot Chart of the North Pacific Ocean

[See foldout on following page.]

PILOT CHART OF THE NORT



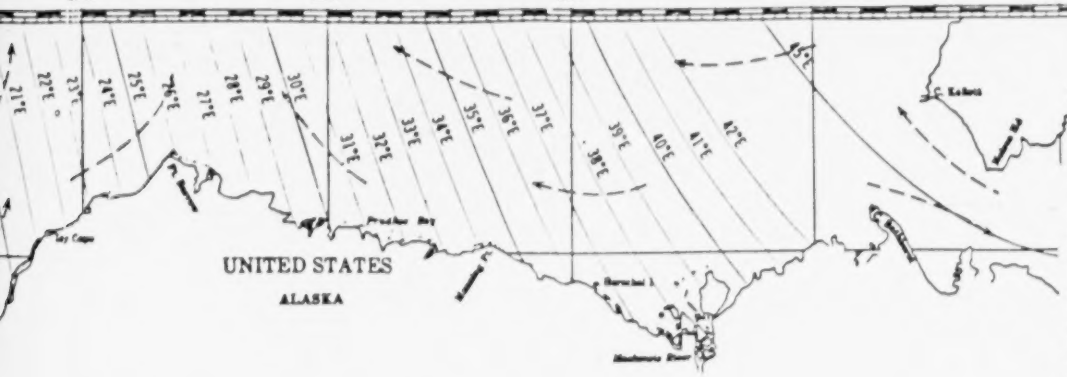
E NORTH PACIFIC OCEAN

Founded upon the researches made in the early part of the nineteenth century by Matthew Fontaine Maury, while serving as a Lieutenant in the United States Navy.

MERCATOR PROJECTION
SCALE 1:20,300,000

180° 150° 140° 130° 120° 110° 100° 90° 80°

70° 60° 50°



USE OF CHART.—This chart is not intended to be used alone but in conjunction with other navigational aids. The chart presents, in graphic form, averages obtained from data gathered over many years in meteorology and oceanography to aid the navigator in selecting the quickest and safest routes. Included are explanations of how to use each type information depicted on this chart.

SURFACE CURRENTS—APRIL

The monthly stream and drift currents shown on this chart by *green* arrows indicate in general the currents that may be expected.

Generally, sufficient data are available to delineate the prevailing current pattern and to determine the mean speed. However, the user is cautioned that changes in wind direction, speed, and duration can change local currents both in direction and speed.

LEGEND

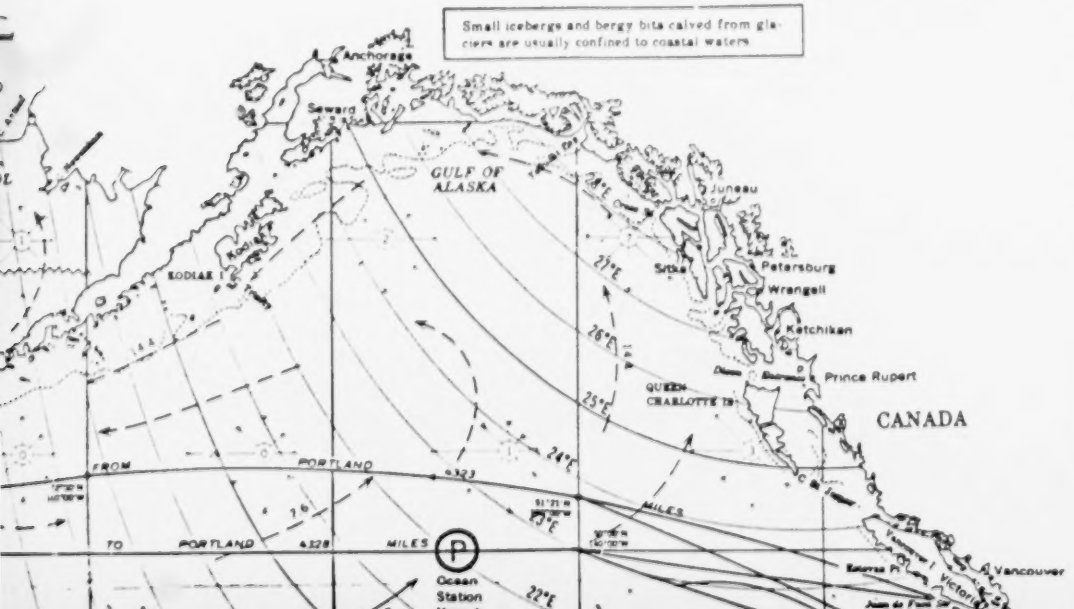
Prevailing direction

Probable direction

19.2 Mean speed in nautical miles per day

Approximate limits of Equatorial Countercurrent

Small icebergs and bergy bits calved from glaciers are usually confined to coastal waters.



WORK OF OUR COOPERATING OBSERVERS APPRECIATED

The Defense Mapping Agency Hydrographic Center (DMAHC) wishes to acknowledge, with deep appreciation, the splendid cooperation that has always been received from the men of the U.S. Navy, U.S. Merchant Marine, and Cooperating Observers of Foreign Merchant Ships. One of our most valuable sources is you, the mariner, because much of the information you are able to provide is not available from other sources. This steady flow of nautical information we receive from Cooperating Mariners from all Nationalities plays a vital role in the day-to-day task of updating charts and publications. Information is desired concerning hydrography, oceanography, marine life, climatology, coastal features, ports and harbors, rivers and channels, navigational aids, ocean and coastal currents, and navigation. In addition, constructive criticism of the products and services of the Defense Mapping Agency Hydrographic Center is always welcome.

Today there is a group of voluntary Cooperating Observers who regularly submit observations to the Defense Mapping Agency Hydrographic Center or through DMAHC Offices located in major seaports of the United States and several foreign countries, or Representatives in New York and New Orleans. In appreciation of their efforts, Cooperating Observers receive, upon request, Pilot Charts and Notice to Mariners. If you are interested in becoming a Cooperating Observer, you should contact one of the DMAHC activities listed below or write to the Defense Mapping Agency Hydrographic Center, Washington, D.C. 20390.

Mariners are invited to visit local Offices of the Defense Mapping Agency Hydrographic Center where files of area charts and publications of this Center may be consulted, latest navigational information would be available, and charting and navigational problems may be discussed. Visiting these Offices before sailing may prove extremely beneficial.

Offices of the Defense Mapping Agency Hydrographic Center and DMAHC Representatives are located as follows:

DMAHC OFFICES IN THE ATLANTIC OCEAN AREA
Norfolk, Virginia, Building SP-228, U.S. Naval Air Station
Jacksonville, Florida, Building 712, U.S. Naval Air Station
Naples, Italy, Building 42, U.S. Naval Air Facility

DMAHC OFFICES IN THE PACIFIC OCEAN AREA
San Diego, California, Building 654, U.S. Naval Air Station, North Island
Honolulu, Hawaii, Building 1710/3300 Hickam Air Force Base
Atsugi, Japan, Building 181, U.S. Naval Air Station
Cubi Point, Republic of the Philippines, Building 120—6, U.S. Naval Air Station

DEFENSE MAPPING AGENCY HYDROGRAPHIC CENTER REPRESENTATIVES:
New York, New York, 201 Varick Street, Room 711
New Orleans, Louisiana, 600 South Street, Room 712

AVERAGE CONDITIONS OF WIND AND WEATHER OVER THE NORTH PACIFIC OCEAN DURING APRIL

PRESSURE.—The Aleutian Low continues to fill with lowest pressure over Kodiak Island. The extent and central pressure of the Asiatic High has decreased considerably. The subtropical High has increased slightly in pressure and has greatly increased its westward extension encompassing the central North Pacific east of 150° E.

TEMPERATURE.—By April the freezing isotherm has retreated significantly northward. It now runs from Bristol Bay westward, then southwestward through the Bering Sea, parallel to the Kamchatka Peninsula, and through the Kuril Islands into the Sea of Okhotsk. Isotherms over the Pacific are oriented in a general east—west direction. The 72° F. isotherm runs through Taiwan and north of Hawaii to south of Baja California. Along the Great Circle Route from San Francisco to Yokohama, average temperatures range from near 60° F. over the northernmost portions to the upper 40's near Yokohama.

WINDS.—Over a large portion of the North Pacific, mainly between 35° N. and 45° N., the wind speeds are force 3-4 in 55 to 65 percent of the observations, except near the North American coast and off the central Japanese coast, where winds of force 4-5 are generally encountered. The prevailing winds are from the westerly quadrants. Between 30° N. and 35° N. winds are variable with forces 3-5 recorded in 60 to 75 percent of the observations. East of the Ryukyu Islands winds have a large easterly component, backing to northeast and north over the East China Sea. The northeast trades prevail over most of the ocean south of 30° N., westward of midocean where their northern limit slopes to about 20° N. South of Shanghai, over the South China Sea to the Philippines, the northeast monsoon continues with less strength and steadiness than in the colder months. The southeast trades are noticeable east of 140° W. and south of 5° N.

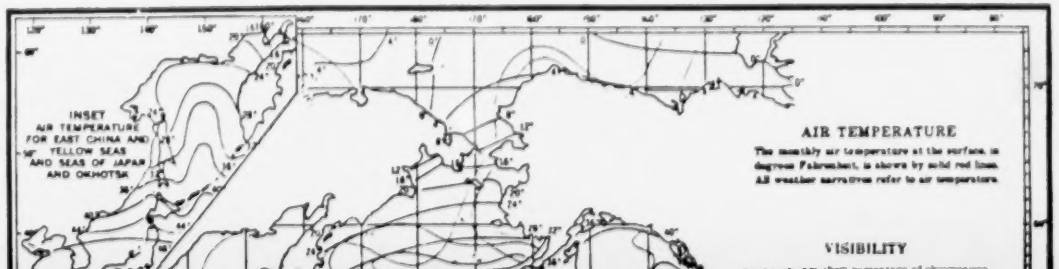
GALES.—Gales have slackened considerably by April. A maximum frequency of 8-13 percent occurs along the Aleutian Islands from Umnak Island to southern Kamchatka. Just west of midocean this area of gales dips southward to the latitude of Yokohama, and just south of the Alaska Peninsula is a small area where gales occur 4 percent of the time. South of 35° N. gales are not encountered more than 4 percent of the time.

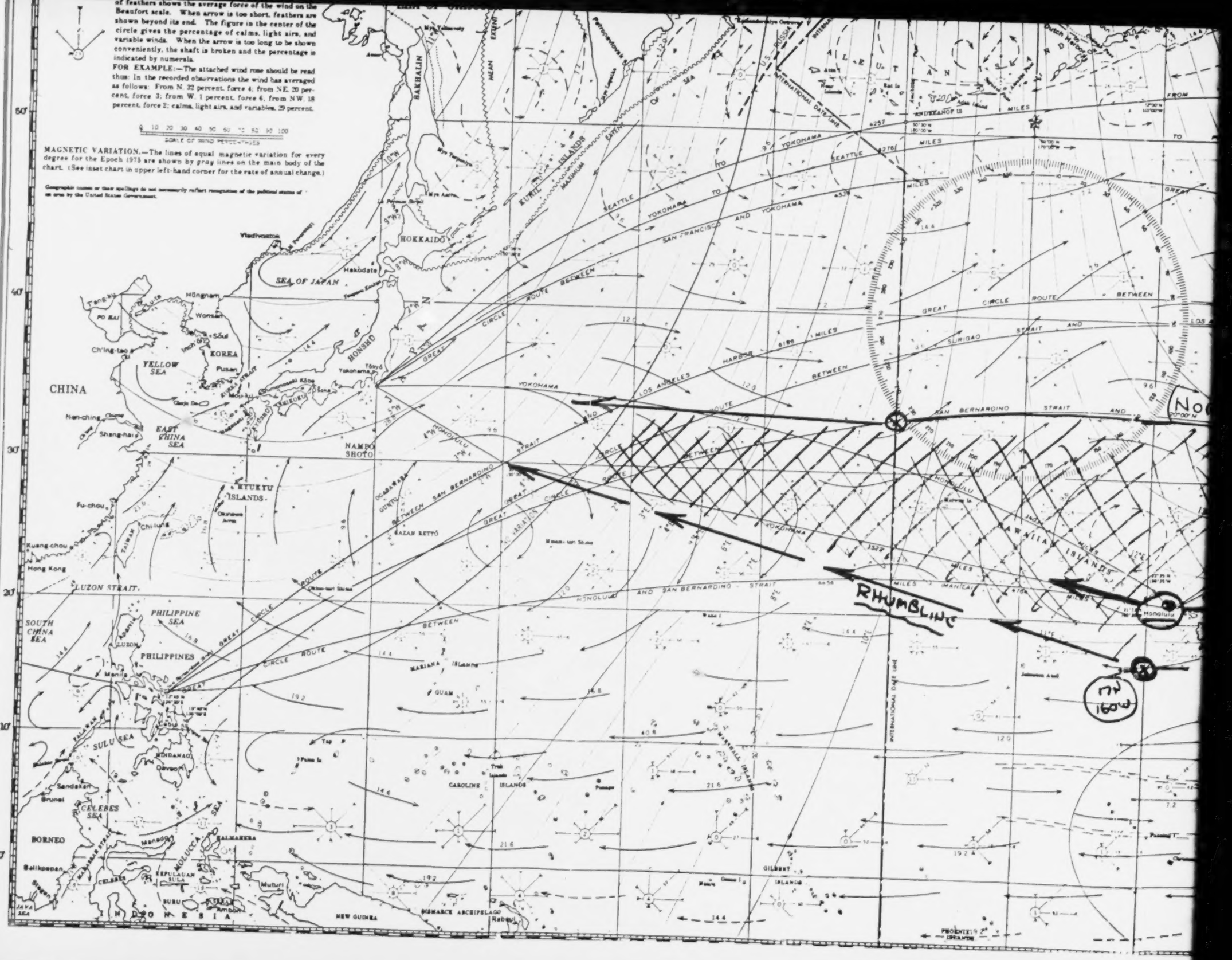
EXTRATROPICAL CYCLONES.—While the mean positions of storm tracks during April closely approximate those of the preceding month, there is a northward displacement near Japan and the Kuril Islands. This generally results in fewer gales and better weather over trans-Pacific routes. The major tracks merge east of Honshu, and run northeastward to the western Aleutian Islands where they split and run either into the eastern Bering Sea or parallel the Aleutian Islands and terminate in the Gulf of Alaska. There is also a decrease in the number of storms that cross southeast Alaska.

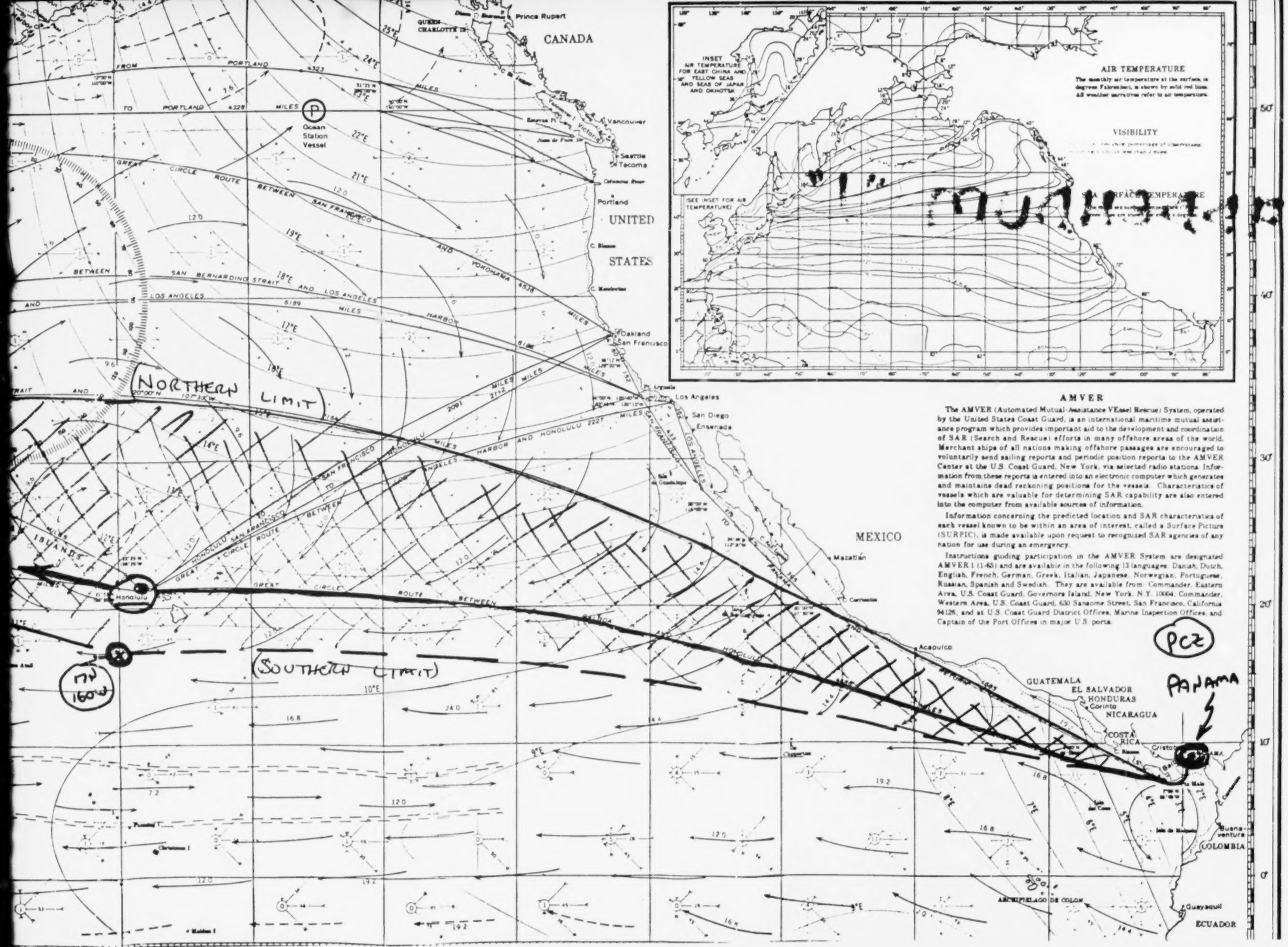
TROPICAL CYCLONES.—Typhoon expectancy in Far Eastern waters is one every 2 or 3 years generally east of the Philippines.

VISIBILITY.—Visibilities are still restricted south of Kamchatka where they fall below 2 miles 25 percent of the time. Visibilities less than 2 miles occur 10 percent of the time in an area from the southern Kuril Islands extending eastward to midocean then northeastward to the Alaska Peninsula. There is an isolated five percent frequency line that runs from southern Korea southeastward to about 20° N., then westward toward Taiwan.

NOTE.—In all cases, it must be borne in mind that ships tend to avoid areas of bad weather. For this reason, ships' observations tend to be biased toward good weather conditions; less gales and high waves being recorded than actually occurred. Hence, climatological estimates will also be biased toward the good weather conditions.




of feathers shows the average force of the wind on the Beaufort scale. When arrow is too short, feathers are shown beyond its end. The figure in the center of the circle gives the percentage of calms, light airs, and variable winds. When the arrow is too long to be shown conveniently, the shaft is broken and the percentage is indicated by numerals.
FOR EXAMPLE:—The attached wind rose should be read thus: In the recorded observations the wind has averaged as follows: From N. 32 percent, force 4; from NE. 20 percent, force 3; from W. 1 percent, force 6; from NW. 18 percent, force 2; calms, light airs, and variables, 29 percent.
0 10 20 30 40 50 60 70 80 90 100
SCALE OF WIND PERCENTAGES
MAGNETIC VARIATION.—The lines of equal magnetic variation for every degree for the Epoch 1975 are shown by gray lines on the main body of the chart. (See inset chart in upper left-hand corner for the rate of annual change.)
Geographic names or their spellings do not necessarily reflect recognition of the political status of the area by the United States Government.
60°
40°
30°
20°
10°
CHINA
YELLOW SEA
EAST CHINA SEA
KOREA
HONSHŪ
HOKKAIDŌ
SEA OF JAPAN
BAKHALIN
KURIL ISLANDS
NANPŌ SHOTŌ
RYUKYU ISLANDS
PHILIPPINE SEA
SOUTH CHINA SEA
PHILIPPINES
SULU SEA
CELEBES SEA
BORNEO
INDONESIA
NEW GUINEA
CAROLINE ISLANDS
MARIANA ISLANDS
GUAM
MARSHALL ISLANDS
GILBERT ISLANDS
HAWAIIAN ISLANDS
LUZON STRAIT
Vladivostok
Hakodate
Hong Kong
Manila
Honolulu
Midway Is.
Wake I.
Johnston Atoll
Palmyra I.
Jarvis I.
Canton I.
Phoenix Is.
Tarawa
Truk Islands
Yap
Palau Is.
Davao
Sandakan
Brunei
Balikpapan
Makassar
Ambon
Merauke
Rabaul
Bismarck Archipelago
Java Sea
Celebes
Halmahera
Molucca Sea
Kepulauan Sula
Mindanao
Luzon
Taiwan
Fu-chou
Shang-hai
Nan-ching
Ch'ing-tao
Hŭngnam
Wŏnsan
Sŏul
Inch'ŏn
Pusan
Tsushima
Tōkyō
Yokohama
Kōbe
Nagoya
Okinawa Jima
Iwo Jima
Chichi Jima
Haha Jima
Minami-tori Shima
Kita-iwo Jima
Kazan Rettō
Ogasawara Gunto
Tang-ku
Po Hai
Chi-lung
Kuang-chou
Amoy
Mys Terpeniya
Mys Aniva
Mys Lopatka
Petropavlovsk
Kamchatskiy Zaliv
Ostrov Karaginskiy
Ostrov Beringa
Ostrov Mednyy
Ostrov Atlasova
Ostrov Paramushir
Ostrov Onekotan
Ostrov Shiashkotan
Ostrov Matua
Ostrov Rasshua
Ostrov Ushishir
Ostrov Ketoy
Ostrov Simushir
Ostrov Chirpoy
Ostrov Brat Chirpoyev
Ostrov Urup
Ostrov Iturup
Ostrov Kunashir
Ostrov Shikotan
Ostrov Zelenyy
Ostrov Tanfilyeva
Ostrov Yuzhno-Kurilskiy
Ostrov Kharimkotan
Ostrov Broutona
Ostrov Ekarma
Ostrov Paramushir
Ostrov Shumshu
Ostrov Atlasova
Ostrov Alaid


CANADA
UNITED STATES
MEXICO
Prince Rupert
QUEEN CHARLOTTE IS.
Vancouver
Victoria
Seattle
Tacoma
Portland
Oakland
San Francisco
Los Angeles
San Diego
Ensenada
Mazatlán
Acapulco
Honolulu
GUATEMALA
EL SALVADOR
HONDURAS
Corinto
NICARAGUA
COSTA RICA
PANAMA
Buenaventura
COLOMBIA
Guayaquil
ECUADOR
ARCHIPIELAGO DE COLON
Ocean Station Vessel
FROM PORTLAND 4323 MILES
TO PORTLAND 4328 MILES
GREAT CIRCLE ROUTE BETWEEN SAN FRANCISCO AND YOKOHAMA 4578 MILES
SAN BERNARDINO STRAIT BETWEEN LOS ANGELES HARBOR AND HONOLULU 2227 MILES
GREAT CIRCLE ROUTE BETWEEN HONOLULU AND SAN FRANCISCO 2091 MILES
GREAT CIRCLE ROUTE BETWEEN HONOLULU AND LOS ANGELES HARBOR 2112 MILES
(NORTHERN LIMIT)
(SOUTHERN LIMIT)
17N 160W
PCZ
INSET AIR TEMPERATURE FOR EAST CHINA AND YELLOW SEAS AND SEAS OF JAPAN AND OKHOTSK
(SEE INSET FOR AIR TEMPERATURE)
AIR TEMPERATURE
The monthly air temperature at the surface, in degrees Fahrenheit, is shown by solid red lines. All weather narratives refer to air temperature.
VISIBILITY
SEA SURFACE TEMPERATURE
AMVER
The AMVER (Automated Mutual-Assistance VEssel Rescue) System, operated by the United States Coast Guard, is an international maritime mutual assistance program which provides important aid to the development and coordination of SAR (Search and Rescue) efforts in many offshore areas of the world. Merchant ships of all nations making offshore passages are encouraged to voluntarily send sailing reports and periodic position reports to the AMVER Center at the U.S. Coast Guard, New York, via selected radio stations. Information from these reports is entered into an electronic computer which generates and maintains dead reckoning positions for the vessels. Characteristics of vessels which are valuable for determining SAR capability are also entered into the computer from available sources of information.
Information concerning the predicted location and SAR characteristics of each vessel known to be within an area of interest, called a Surface Picture (SURPIC), is made available upon request to recognized SAR agencies of any nation for use during an emergency.
Instructions guiding participation in the AMVER System are designated AMVER 1 (1-65) and are available in the following 13 languages: Danish, Dutch, English, French, German, Greek, Italian, Japanese, Norwegian, Portuguese, Russian, Spanish and Swedish. They are available from: Commander, Eastern Area, U.S. Coast Guard, Governors Island, New York, N.Y. 10004; Commander, Western Area, U.S. Coast Guard, 630 Sansome Street, San Francisco, California 94126, and at U.S. Coast Guard District Offices, Marine Inspection Offices, and Captain of the Port Offices in major U.S. ports.

Supreme Court, U.S.
FILED
AUG 17 1983
ALEXANDER L. STEVAS, CLERK

No. 83-94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

S.S. NANCY LYKES, her engines, boilers, etc. and LYKES BROS. STEAMSHIP COMPANY, INC.,

Petitioners,

—against—

GENERAL ELECTRIC COMPANY INTERNATIONAL SALES DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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LAWRENCE B. BRENNAN
Of Counsel

August 15, 1983

Counter-Statement of Questions Presented for Review

1. Is the finding that the petitioner, in light of all the circumstances, engaged in a pre-planned unreasonable deviation by diverting its vessel to San Pedro solely for its own pecuniary gain, a finding which is subject to the review of this Court?

2. Is the petitioner deprived of its contractual, bill of lading, liability limitations because of its unreasonable deviation?

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

POINT I—The Second Circuit's concurrence with the Trial Court factual finding that Lykes unreasonably deviated is amply supported by the record 6

POINT II—The Second Circuit correctly determined that the COGSA package limitation was inapplicable since Lykes had engaged in an unreasonable deviation 7

CONCLUSION 11

APPENDIX 1a

Excerpts from Deposition of Sidney Rivers 1a
Excerpts from Deposition of John Scally 2a
Excerpts from Testimony of Dale Werner 4a
Excerpts from Testimony of Robert A. Raguso 6a
Excerpts from Testimony of Richard Oakes Patterson 16a
Excerpts from Testimony of Ralph Lacher 18a
Excerpts from Testimony of William Kaciak 27a

TABLE OF AUTHORITIES

Cases:

Atlantic Mutual Ins. Co. v. *Poseidon Schiffahart, G.m.b.H.*, 313 F.2d 872 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963) 5, 8

DuPont de Nemours Int'l. S.A. v. *S.S. Mormacvega*, 493 F.2d 97 (2d Cir. 1974) 8, 9

Encyclopaedia Britannica, Inc. v. *S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970) 5, 9

General Motors Corp. v. *S.S. Mormacoak*, 327 F. Supp. 666 (S.D.N.Y.), *aff'd*, 457 F.2d 24 (2d Cir. 1971) .. 7

Hellenic Lines, Ltd. v. *United States*, 512 F.2d 1196 (2d Cir. 1975) 9

Jones v. *The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953) 8, 9

Miller Yacht Sales, Inc. v. *M/V Vishva Shobha*, 494 F. Supp. 1005 (S.D.N.Y. 1980) 7

Mitsui & Co., Ltd. v. *American Export Lines*, 636 F.2d 807 (2d Cir. 1981) 10

Nemeth v. *General Steamship Corp.*, 694 F.2d 609 (9th Cir. 1982) 8, 9, 10

Niles-Bement-Pond Co. v. *Dampkiesaktieselskabet Balto*, 282 F. 235 (2d Cir. 1922) 8

The Pelotas, 66 F.2d 75 (5th Cir. 1933) 8

The Sarnia, 278 Fed. 459 (2d Cir. 1921), *cert. denied*, 258 U.S. 625 (1922) 7

St. John's Corp. v. *Companhia Geral Commercial do Rio De Janeiro*, 263 U.S. 119 (1923) 7

Searoad Shipping Co. v. *E. I. duPont de Nemours and Company*, 361 F.2d 833 (5th Cir. 1966) *cert. denied*, 385 U.S. 973 (1966) 5

Spartus Corp. v. *The S/S Yafo*, 590 F.2d 1310 (5th Cir. 1979) 8, 9

United States v. *Johnston*, 268 U.S. 220 (1925) 6

United States Shipping Board E.F. Corp. v. *Rosenberg Bros. & Co.*, 12 F.2d 721 (9th Cir. 1926), *reversed on other grounds*, 276 U.S. 202 (1928) 7, 8

The Waalhaven, 36 F.2d 706 (2d Cir. 1929), *cert. denied*, 281 U.S. 747 (1930) 5, 7

The Willdomino, 300 F. 5 (3rd Cir. 1924), *aff'd, sub nom. The Willdomino* v. *Citro Chemical Co.*, 272 U.S. 718 (1927) 7

W.R. Grace & Co. v. *Toyo Kisen Kabushiki Kaisha*, 7 F.2d 889 (N.D. Cal. 1925), *aff'd* 12 F.2d 519 (9th Cir.), *cert. denied*, 273 U.S. 717 (1926) 5

Statutes:

United States Carriage of Goods by Sea Act, 46 U.S.C. 1300, *et seq.*:

Section 1301(c) 7
Section 1303(8) 9
Section 1304(4) 8, 9
Section 1304(5) 8, 9, 10
Section 1305 9

46 U.S.C. §§ 181, 183-189, 190-194 7

Other Authority

Knauth. *Ocean Bills of Lading*, 241 (4th ed. 1953) ... 8

RESPONDENT'S BRIEF IN OPPOSITION

Counter-Statement of the Case

General Electric Company International Sales Division[1] (hereinafter G. E.) submits its Counter-Statement of the Case solely to correct the inaccuracies and omissions in the Statement of the Case in the Petition of Lykes Bros. Steamship Company, Inc. (hereinafter Lykes). It should be noted that G. E. considers the true facts of this case adequately set forth in the opinions of Judge Lasker and the Second Circuit Court of Appeals (P. App., A1-B12).* We shall deal with the inaccuracies and misstatements set forth in Lykes' Petition in their sequential order of appearance, rather than dealing with the most or least important first.

At page 3 of its Petition, Lykes states that all of the bills of lading, including those for previous shipments aboard Lykes' vessels, had been prepared by an agent of General Electric. In support, Lykes cites P. App. E18. Not only does this page of Lykes' Appendix fail to support its contention, but also, the record is totally devoid of any such evidence. In fact, Lykes never produced any of its bills of lading for prior G. E. locomotive shipments it carried. Unfortunately, as repeatedly done by Lykes throughout its Appendices, P. App. E18 is taken totally out

[1]General Electric Company is a publicly held corporation incorporated in the State of New York with its office of record at 1 River Road, Schnectady, New York, its headquarters in Fairfield County, Connecticut, and the offices of its International Trading Operations at 570 Lexington Avenue, New York, New York. The support services and support of export sales previously performed by the International Sales Division, which has been dissolved since this lawsuit began, are currently performed by the Company's International Trading Operations. These entities were and are wholly owned by the Company.

Canadian General Electric Company Limited, General Electric de Mexico—S.A. de C.V. and SADELMI-COGEPI, Compagnia Generale Progettazioni e Installazioni S.p.A. are affiliates of General Electric Company.

*All references to "P. App." are to the Appendices of Lykes' Petition with appropriate references to the pages of Appendices A, B, C, D and E.

of context from the actual trial and appellate record. A review of the complete and relevant testimony indicates that the witness, cited by Lykes, had limited his testimony solely to the particular shipment in question (R. App. 2a-4a).** Equally misleading is the statement in the first paragraph of page 4 of Lykes' Petition which implies that the cargo underwriter for G. E. paid the entire claim and covered the entire risk. Indeed, the record below clearly demonstrates that G. E. was paid only $1,075,000 by its underwriter, and that the full replacement value of the locomotive cabs, together with the additional ocean freight for transporting the replacements was $1,709,000. Thus, G. E. had a substantial uninsured interest of $634,000 which was part of the judgment (P. App. C1-C2, E7, R. App. 4a-6a).

On pages 4 and 5 of its Petition, Lykes, once again, continues to claim that the route actually taken by the NANCY LYKES was customary and that the actual route was a recognized great circle route presumably used by other liner services between the Panama Canal and Kobe, Japan. In fact, despite these assertions, Lykes utterly failed to offer any testimony that there was any such customary route. Even its own weather expert, who was retained only after the vessel arrived at San Pedro and after weather conditions had begun to severely deteriorate off the California coast, admitted during cross-examination, that the customary routes from Panama to Kobe were considerably south of the route actually taken (R. App. 28a-30a). Despite this, Lykes still claims, as it did without success to the Second Circuit, that the pilot chart in evidence contains a great circle route between the Panama Canal and Kobe, Japan. Reference to the pilot chart cited by Lykes (P. App. E25), clearly shows that there is no such route. Lykes is apparently linking two separate and distinct routes together, one route from the Panama Canal to Los Angeles to a second route from San Francisco to Yokohama, Japan, and inferring that the linked routes are one, continuous recommended route from the Canal to Kobe.

**All references to "R. App." are to the Respondent's Appendix.

In fact, the only routes specified from Los Angeles (San Pedro) to the Far East on the pilot chart (P. App. E25), are routes through Honolulu and to the Surigao Strait and the San Bernardino Strait.

At the time of the casualty, the NANCY LYKES was approximately 600 miles north of the northernmost customary route calculated on a straight north-south line between the site of the casualty and the border of the northernmost customary route. At the same time, the ship was approximately 1020 miles north of the pilot chart route and 1320 miles north of the southernmost envelope boundary (P. App. A10, A25, R. App. 13a).

Despite Lykes' assertions, every mariner with experience of spring weather conditions off the California coast, including the NANCY LYKES chief mate for this voyage, acknowledged that gale and near gale northerly winds were a well-known problem (P. App. B9, R. App. 1a, 8a-9a). If Lykes had used any of the admitted customary and usual envelope routes, it was uncontroverted that the locomotives would have arrived safely at their destination (P. App. B2, B8-B9, R. App. 7a, 13a-15a, 16a-17a). Lykes admitted that the sole reason for the deviation was its own pecuniary gain, without regard to the safety of the cargo (P. App. B9, R. App. 20a-26a). In fact, the NANCY LYKES, which was considerably behind its published schedule before the deviation, lost an additional three days and 14 hours by going to San Pedro (R. App. 18a).

At page 4 of its Petition, Lykes implies a prior usage of San Pedro as a bunkering port for its vessels and indicates that it had been using that Port since 1937. In fact, Lykes never had any vessel stop for bunkers at any port, other than a regularly scheduled cargo port-of-call, before January 1978 (R. App. 22a-24a, 26a). Only two of Lykes' ships outbound, from the United States Gulf Coast to the Far East, had ever stopped at San Pedro before this voyage (R. App. 18a-20a).

Lykes places great emphasis in its Petition, at pages 5 and 6, on the fact that the pilot chart (P. App. A25) indicates that the frequency of gales south of 35°N is not more than 4% during the month of April. This new reliance by Lykes is misplaced since the pilot chart completely fails to delineate, by longitude, the areas of the vast Pacific involved. Furthermore, the pilot chart, on its face, states:

> "Founded upon the researches made in the early part of the nineteenth century by Matthew Fontaine Maury, while serving as a Lieutenant in the United States Navy."

Obviously, aside from its lack of detail, the weather information in the pilot chart may be out-dated. Further, the pilot chart suggests that more detailed information of the conditions for U.S. coasts be obtained from the "Coast Pilot" which is prepared by the National Ocean Survey and the "Mariners Weather Log" prepared by the National Oceanic and Atmospheric Administration (NOAA) which was in evidence. This undoubtedly is one reason why both sides retained their own weather experts to testify at trial.

G. E.'s weather expert, in using data compiled for the last 22 years, for the specific area of the ocean where the loss took place, testified, with supporting documentation, that the percentage possibility or probability of encountering gale winds was 5-6% (R. App. 8a, 15a-16a). Lykes' weather expert, on the other hand, was vague in his testimony concerning the probability of adverse weather off the California coast and completely failed to define, by longitude, the area he was discussing (R. App. 27a-28a).

Equally misplaced is Lykes contention, at page 6 of its Petition, that it was not forewarned of the possibility of adverse weather by the prior visits of the BRINTON LYKES and DOLLY TURMAN to San Pedro. The record is quite clear that the DOLLY TURMAN encountered Gulf of Tehuantepec winds as a direct result of her deviation to San Pedro (R. App.

6a, 9a-13a). Insofar as the BRINTON LYKES is concerned, it is most probable that that vessel was on a far more northerly route than what would have been customary because of its diversion to San Pedro. At any rate, Lykes failed to produce any evidence of what that vessel's route would have been but for its diversion.

Reasons for Denying the Writ

This Court has repeatedly denied certiorari in similar matters involving the same issues. *Encyclopaedia Britannica, Inc.* v. *S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970); *Searoad Shipping Co.* v. *E.I. duPont De Nemours & Co.*, 361 F.2d 833 (5th Cir.), *cert. denied*, 385 U.S. 973 (1966); *Atlantic Mutual Ins. Co.* v. *Poseidon Schiffahart, G.m.b.H.*, 313 F.2d 872 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963); *The Waalhaven*, 36 F.2d 706 (2d Cir. 1929), *cert. denied*, 281 U.S. 747 (1930); *W. R. Grace & Co.* v. *Toyo Kisen Kabushiki Kaisha*, 7 F.2d 889 (N.D. Cal. 1925), *aff'd*, 12 F.2d 519 (9th Cir.), *cert. denied*, 273 U.S. 717 (1926). In *Atlantic Mutual, supra*, the Seventh Circuit noted that the unreasonable deviation ousted the contract and deprived the carrier of the bill of lading limitations leaving only the statutory, Carriage of Goods by Sea Act (hereinafter COGSA), 46 U.S.C. §1300 *et seq.*, limitations. There is no conflict between the instant case and *Atlantic Mutual, supra*, because here the statute, COGSA, did not apply as a matter of law but only as a contractual provision which, the Seventh Circuit would agree, was ousted by the unreasonable deviation. No new issues or industry-wide considerations exist to warrant this Court's exercise of its jurisdiction. Therefore, certiorari should be denied.

POINT I

The Second Circuit's concurrence with the Trial Court's factual finding that Lykes unreasonably deviated is amply supported by the record.

The finding that the deviation was unreasonable, as stated here by the Second Circuit (P. App. A12-A14) was clearly a finding of fact and as such does not belong before this Court. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

This factual finding was overwhelmingly supported by the record which clearly showed:

a. Lykes sole purpose in sending the NANCY LYKES to San Pedro was its own financial gain (P. App. B5-B6, B9, R. App. 20a-26a);

b. Lykes never advertised San Pedro as one of its ports-of-call for this voyage of the NANCY LYKES (P. App. B5, B11-B12, R. App. 22a);

c. Lykes' operations department planned the deviation before the voyage began and totally failed to consider the impact of such a deviation on the safety of the crew, vessel and cargo (P. App. B9, R. App. 20a-22a);

d. The deviation was made despite Lykes knowledge of potentially adverse weather and ocean current conditions (P. App. B9, R. App. 25a);

e. The deviation placed the vessel 600 to 1320 miles north of where it should have been and delayed its already very late expected arrival in Japan by an additional 3 days, 14 hours (P. App. A10, R. App. 16a-18a), and

f. Lykes failed to retain a weather routing service until the vessel had already arrived at San Pedro and weather conditions outside the Port had begun to deteriorate (R. App. 28a-30a).

As the Second Circuit here stated:

> ". . . [A] deviation is unreasonable thereby breaching the contract of carriage, when, in the absence of significant countervailing factors, the deviation substantially increases the exposure of cargo to foreseeable dangers that would have been avoided had no deviation occurred." (P. App. A-14).

POINT II

The Second Circuit correctly determined that the COGSA package limitation was inapplicable since Lykes had engaged in an unreasonable deviation.

Since the locomotives were carried on the deck of the NANCY LYKES, COGSA did not apply by and of its own statutory force, but only as a contractual bill of lading provision, 46 U.S.C. §1301(c); *General Motors Corp.* v. *S.S. Mormacoak*, 327 F. Supp. 666, 667 (S.D.N.Y.), *aff'd*, 451 F.2d 24 (2d Cir. 1971); *Miller Yacht Sales, Inc.* v. *M/V Vishva Shobha*, 494 F. Supp. 1005, 1014 (S.D.N.Y. 1980). *See also*, P. App. A15, footnote 7.

It was manifestly clear that before the enactment of COGSA, the entire contract of carriage was ousted when an ocean carrier engaged in an unreasonable deviation. *The Waalhaven, supra; The Willdomino*, 300 F. 5 (3rd Cir. 1924), *aff'd, sub nom. The Willdomino* v. *Citro Chemical Co.*, 272 U.S. 718 (1927); *St. John's Corp.* v. *Companhia Geral Commercial do Rio De Janeiro*, 263 U.S. 119, 124 (1923); *The Sarnia*, 278 Fed. 459, 463 (2d Cir. 1921), *cert. denied*, 258 U.S. 625 (1922).

Prior to COGSA, the Harter Act and Limitation of Liability Act provisions that might be for the carrier's benefit were also ousted by an unreasonable deviation. 46 U.S.C. §§ 181, 183-189, 190-194; *United States Shipping Board E.F. Corp.* v. *Rosenberg*

Bros. & Co., 12 F.2d 721, 723 (9th Cir. 1926), *reversed on other grounds*, 276 U.S. 202 (1928); *The Pelotas*, 66 F.2d 75, 77 (5th Cir. 1933); *Niles-Bement-Pond Co.* v. *Dampkiesaktieselskabet Balto*, 282 F. 235, 237 (2d Cir. 1922).

Since the Seventh Circuit in *Atlantic Mutual Ins. Co., supra*, agrees that an unreasonable deviation voided the ocean carrier's bill of lading, there is no need to discuss the "in any event" language contained in COGSA, Section 1304(5).

COGSA Section 1304(4) merely state that there are both reasonable and unreasonable deviations, with two types of deviations to be considered as *prima facie* unreasonable. Obviously, the framers of COGSA had no intent of changing the well-known, pre-existing law concerning reasonable and unreasonable deviations otherwise they surely would not have mentioned both types of deviations. The vast majority of decisions concerning the COGSA effect of unreasonable deviations have stated that there was no intent by Congress to effect a change in the pre-existing common law rule by abolishing the penalty an ocean carrier would have to pay for an unreasonable deviation. *Nemeth* v. *General Steamship Corp.*, 694 F.2d 609 (9th Cir. 1982); *Spartus Corp.* v. *The S/S Yafo*, 590 F.2d 1310 (5th Cir. 1979); *DuPont de Nemours Int'l. S.A.* v. *S.S. Mormacvega*, 493 F.2d 97, 100 (2d Cir. 1974); *Jones* v. *The Flying Clipper*, 116 F. Supp. 386, 389-390 (S.D.N.Y. 1953).[2]

The courts have set forth a number of reasons for imposing full liability, notwithstanding any package limitation, on an ocean carrier which unreasonably deviates. These reasons are as follows:

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[2]"Neither the Convention nor any Act passed under the Convention contains any provision concerning the legal result of a deviation. Nor is there any other statute on the subject. Consequently the general case law continues to furnish the rule." Knauth, *Ocean Bills of Lading*, 241 (4th ed. 1953).

a. If the limitation were to be left intact, then an unjustified deviation would be no different than any ordinary breach of the carrier's obligations;

b. Mere negligence of the carrier in the performance of its statutory duties was never the same as deviation;

c. The carrier's voluntary, unreasonable deviation has the effect of changing the very essence of the contract of carriage;

d. Permitting the survival of the package limitation where an unreasonable deviation has taken place would be tantamount to licensing an ocean carrier to recklessly violate the terms of a bill of lading, not to mention the safety factor involved, while only being liable for the small limitation amount;

e. An unreasonable deviation exposes the cargo to risks that neither the shipper nor its underwriter anticipate; and

f. There is nothing in COGSA to indicate that shippers should anticipate an unreasonable deviation.

Nemeth, supra, 612-613; *Spartus Corp., supra,* 1316-1317, *S.S. Mormacvega, supra; The Flying Clipper, supra. See also, Hellenic Lines, Ltd.* v. *United States,* 512 F.2d 1196 (2d Cir. 1975); *Encyclopaedia Britannica, supra.*

In addition, it should be noted that Sections 1304(5) and 1305 of COGSA permit a carrier to increase its potential liabilities, but Section 1303(8) strictly prohibits a carrier from diminishing its potential liabilities. Obviously, if a carrier had undertaken to increase its liabilities, the "in any event" language of COGSA Section 1304(5), standing on its own, could not be literally interpreted. Lykes chose to unreasonably deviate and, in doing so, chose under COGSA Sections 1304(5) and 1305 to increase its liabilities and responsibilities. A literal interpretation of the "in any event" clause of COGSA Section

1304(5) not only fails to take into consideration other language in COGSA but also is totally unrealistic in light of the effect such an interpretation would have.

Once again, Lykes is contending that, since cargo has its own insurance protecting it against deviation, there is no need for imposing full liability on the ocean carrier. This argument, like the literal interpretation of "in any event" in COGSA Section 1304(5), makes no practical sense. What Lykes fails to mention is that the vast majority of ocean carriers also have their own deviation insurance and that since the ocean carrier, not cargo, made the choice to unreasonably deviate, the ocean carrier or its underwriter should pay. Furthermore, not all cargo is insured and not all cargo is fully insured, as in this case. *See, Nemeth, supra.* Yet, there should only be one rule of law and that rule should be one that consistently places the penalty on the wrongdoer rather than on the innocent party. As was aptly stated by the Second Circuit in *Mitsui & Co., Ltd.* v. *American Export Lines,* 636 F.2d 807, 815 (2d Cir. 1981):

> "That [legislative] history leaves no room for doubt that the two dominant objectives of Congress were to ensure uniformity in the basic rights and responsibilities arising out of bills of lading and—most important for our present inquiry—to fix 'an irreducible minimum of immunity of the carrier from liability'. H.R.Rep. No. 2218, 74th Cong., 2d Sess., 1 (1936). This latter objective underlies both the carrier's duties to furnish a seaworthy ship and to care properly for the cargo, 46 U.S.C. §§ 1303(1) and 1303(2), and the minimum level of liability established by § 4(5). To fulfill Congress' ultimate objective, both aspects of the statute must be given effect; *the carrier's duties would be meaningless if their violation entailed no significant liability.* In interpreting § 4(5), courts must therefore take a critical look at any proposed construction of that section that would reduce a carrier's liability below reasonable limits. A similar conclusion is dictated under Lord Diplock's thesis

that the carrier must be subject to 'a liability for loss or damage to the goods sufficient to provide him with a commercial inducement to undertake precautions [in addition to those required for protection of the vessel], the cost of which would be economically justified by the risk of loss or damage to the goods.' Conventions and Morals—Limitation Clauses in International Maritime Conventions, 1 Journal of Maritime Law & Commerce (hereinafter JML&C) 525, 527 (1970)." (emphasis added).

CONCLUSION

The questions presented were correctly decided and interpreted by the courts below and the writ should be denied in all respects.

Dated: August 15, 1983

Respectfully submitted,

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Excerpts from Deposition of Sidney Rivers

(57)[1]Q. You would recall, I would assume, any hove to, A. The ship was under very slow speed at the time.

Q. Had it come to a stop? A. No, it had not come to a stop, we were just making headway, but we did not come to a stop.

Q. Had you ever had occasion, prior to this, to be off the California Coast in May or last April? A. Many years back when I used to be sailing in the forecastle.

Q. And would that have been once or twice? In other words, what I really am asking is, do you have any experience at all prior to this with the weather conditions off the California Coast in April or May? A. Oh, yes.

Q. You have experience? A. Yes.

Q. During those times had you encountered weather conditions similar to this in April, or May off the California Coast? A. Yes.

Q. Isn't it fairly common to experience Santa Anna (58) winds off the California Coast during April and May? A. Around that time of the year.

Q. You would agree with that, wouldn't you? A. Yes.

Q. Is it also common to experience weather conditions similar to this off the Panama Coast in April or May? A. No.

Q. Concerning the storm that you encountered prior to leaving the Port of Los Angeles, or San Pedro, were you aware that any storm was going on out at sea at that time? A. Not to my knowledge, no.

Q. And after leaving safe harbor did you begin to notice that the weather conditions were becoming adverse? A. I think it was in the evening time, in the evening time, a day after sailing it started to get swells.

Q. Would that have been the same day you left port? A. Yes, the same day.

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[1]Numerals in parenthesis refer to the original page numbers in the deposition on transcript being excerpted.

EXCERPTS FROM DEPOSITION OF JOHN SCALLY

Q. How bad was the swelling? A. Well, it was not too bad at that present time, * * *

* * * * *

(14) * * *

Q. Mr. Scally, was there a difference in the rates quoted to you between a shipment of on-deck cargo and under-deck cargo? A. No.

Q. In this particular instance, referrable now to the locomotives, was it your understanding that GE would be charged a rate commensurate with on-deck cargo?

MR. CONE: I object to the form of that question, because he has already answered there is no difference between an on-deck rate and any other rates.

Q. At any particular time were you quoted a rate for under-deck cargo by Lykes Bros.?

MR. CONE: You are referring to this under-deck cargo here?

MR. KEENAGHAN: Yes, for this under-deck cargo.

THE WITNESS: Can we go off the record?

MR. KEENAGHAN: Yes.

(Discussion off the record)

MR. KEENAGHAN: Let's go back on the record with this.

(15) A. (Continuing) The cargo, generically, that you speak of, consists of three pieces.

One is the superstructure, which is the large cab, and two trucks or bogies.

The bogies, or trucks, they are under-deck.

So, if you will stay away from those, I will answer your question.

The question of under-deck is not germane, nor did it come

up, because the units physically could not be carried under-deck on the Lykes service.

Q. You are referring now to the cabs? A. To the cabs, yes.

Q. The other portion of the shipment, which I think you called bogies— A. Or trucks, yes.

Q. —they were shipped under-deck? A. Yes.

Q. Were they shipped at a different rate than the on-deck cargo? A. No, because this was a lump sum, three parts, three pieces, one rate.

Q. If I may draw your attention to the Bill of Lading, the cargo is described as 3 skids: "electric locomotive." And then the gross weights and measurements are (16) quoted here. And this is repeated three times.

Now, did you have an understanding at the time that this Bill of Lading was executed as to what the term "skids" meant?

MR. CONE: Understanding with whom?

Q. Did you know, sir, of your own personal knowledge, what the term "skids" meant when used in this context here? A. I know what the term skid means. The locomotive is made up of three parts, as I mentioned. All of these are on a skid of some type. They are three skidded pieces.

The cab is skidded, because the bogies are not on it, and it must be supported.

Then the bogies are also skidded.

So they are called three skidded pieces. Probably the word pieces would have been more definitive here.

Q. By th way, the Bill of Lading is printed on a document that bears the heading "Lykes Bros. Steamship Co., Inc., Intermodal Bill of Lading; is that right? A. Yes.

Q. Where did you get the particular document that your company prepared? (17) A. Our Freight Forwarder prepared the document, and I have to assume that this is customary of the steamship company—in this case, Lykes Bros.—that they supplied us with the appropriate form.

Excerpts from Deposition of John Scally

Q. Who is your Freight Forwarder? A. As indicated on the Bill of Lading, J. D. Smith Inter-ocean, Inc.

Q. In addition to the Bill of Lading, have you brought other documents with you that were prepared prior to the shipment of this particular cargo? A. I have some documentation with me, yes.

MR. KEENAGHAN: I would call for the production of those documents that were prepared to the actual shipment of cargo.

MR. CONE: Off the record.

(Discussion off the record)

MR. CONE: Let's go back on the record.

The witness has produced from the GE File of Documents a Shipping Expense Invoice No. 12223, dated April 17, 1978, covering the Ocean Freight and Insurance in the sum of $101,246.53.

In addition, the witness has produced three separate and distinct invoices, each for one locomotive that was transported on the S.S. NANCY LYKES.

EXCERPTS FROM TESTIMONY OF DALE WERNER

(17) * * *

Q. And what are those actual costs? A. The actual costs as shown on page 2 are $1,638,000.

Q. The $1,638,000, does that include ocean freight? A. That does not include ocean freight.

Q. Do you know how much the ocean freight was? A. $71,000.

Q. In connection with the $1,638,000, how does that breakdown according to the last exhibit that you have in front of you? A. Okay.

Excerpts from Testimony of Dale Werner

THE COURT: Excuse me, how much did you say the freight was?

THE WITNESS: $71,000.

THE COURT: Go ahead.

MR. COSTELLO: How much?

MR. CONE: $71,000.

MR. COSTELLO: Even?

MR. CONE: Yes.

A. The direct material content of the two cabs was $666,000. The direct labor of the two locomotives was $93,000. The variable indirect manufacturing (18) expense was $242,000. The base manufacturing expense was $226,000. Engineering expense was $238,000. Administrative expenses were $173,000.

Q. In connection with the replacement of the two locomotive cabs and platforms that we are discussing here, in the expenses involved of $1,638,000, did that figure differ from the original costs incurred by GE for the manufacture of the two locomotive cabs and platforms that were lost over the side of the Nancy Lykes? A. Yes. There was a difference in cost.

Q. Do you have any idea of what the difference was? A. I think the difference was probably 10 percent higher due to the the fact they were built a year later at a higher rate of inflation.

Q. You mean 10 percent higher for the replacement, is that correct? A. Yes.

Q. The reason for that was what? A. Inflation.

Q. In addition to the $1,638,000 costs, am I correct that you had ocean freight charges of $71,000? A. That is correct.

(19)Q. If I were to add those two figures, are they the full amount of actual costs incurred by General Electric for replacement of the two locomotive cabs and platforms in question? A. Yes.

Q. Concerning the original invoice price for these locomotives; in other words, the price for which they were sold to the Taiwan Rail Administration, do you know when the contract

was entered into between GE and the Taiwan Rail Administration? A. The contract was entered in 1974.

Q. In connection with those invoice prices, do you know whether GE agreed to one price for the entire term of the contract? A. Yes, they did.

Q. Do you know whether GE in fact as the contract time went by incurred costs that were over what they had billed the Taiwan Rail Administration? A. The costs were in excess of the amount billed to the Taiwan Railway Association.

* * * * *

EXCERPTS FROM TESTIMONY OF ROBERT A. RAGUSO

(62) * * *

[RAGUSO]

So the first hazard, we will say, or possible pit fall to any coastal track might be the passing through the Gulf of Tehuantepec and whether or not there might be northerly winds entering into that region from the Gulf of Mexico.

MR. COSTELLO: I move to strike the answer, your Honor. It is dealing in possibilities. The answer is purely speculative as to what the ship may or may not have run into.

THE COURT: The objection is overruled because I understand it's quite germane to the case as to whether if the ship did meet such bad weather, the weather was foreseeable or not and the answer of the witness is certainly relevant to that.

MR. CONE: Yes, your Honor, and we are not now dealing with this specific voyage, but just in general.

THE COURT: I understand.

* * * * *

Excerpts from Testimony of Robert A. Raguso

(75) * * *

Q. All right, Mr. Raguso, if Bendix Marine Services had been retained by Lykes Bros. to route the Nancy Lykes on the particular voyage that we are talking about toward the Far East and you were told by Lykes that three locomotive cabs and platforms were on the deck over a hatch cover lashed athwart ships with a total of 60 tons worth of chains on each, how would you have routed that vessel across the Pacific?

MR. COSTELLO: Objection, your Honor.

MR. CONE: That's a valid hypothetical, your Honor. The witness is an expert.

THE COURT: Overruled.

A. With the vessel's specification as you have stated them, it would be our understanding that it (76) would be a safety routing, and to that degree we would have routed him most probably south of Honolulu in order to keep him in—keep the vessel in the favorable easterly trades and avoid completely any risk of adverse weather and adverse ocean current conditions which would be found much to the north, so we would probably have directed him or suggested or recommended to the master that he consider a track just to the south of Honolulu and then to rhumb line toward the approaches of destination Japan.

Q. If in fact the Nancy Lykes had taken the track that you recommended, would it have encountered adverse weather conditions or pit falls? A. No, sir. Favorable conditions for at least three-quarters to almost the entire voyage. There was a frontal passage that had to be expected within a day's arrival of Japan, but favorable conditions, quartering and following winds and seas of force 3 to force 5 for at least four-fifths of the voyage.

Q. In connection with the loss of the locomotive cabs and platforms, did you research the particular weather event that was causative of that loss? A. Yes, sir, I did.

Excerpts from Testimony of Robert A. Raguso

(85) * * *

THE COURT: Excuse me, that is confusing. It sounds to me as if there were more gales than there were hours.

THE WITNESS: No, there are 704 hours of gales as opposed to 6,696 hours in each of the respective Mays, so in a word, you are pretty close to about a 10 percent incidence of gales in this corridor.

THE COURT: Slightly higher.

A. If you reduce your corridor and not discuss any of the orient coast or the more northerly reaches of this corridor, and just look at the California coast, a conservative figure would certainly be a five to six percent incidence of gales in any month of May for the previous ten years.

Q. Am I correct that the problem within the corridor that you testified to, whether at the top of the corridor or at the bottom of the corridor, is still caused by the same basic weather conditions? A. That is right. It is a northerly, so that if it is observed and recorded at latitude 48, if you wait awhile, if you wait a day, or 12 hours or 18 hours, that northerly wind and sea will roll onto the south so that vessels to the south of that position will (86) certainly be encountering that.

THE COURT: I would like to ask you a question. With regard to the question of general awareness of this phenomenon within the maritime profession, in my landlubberly experience, it seems similar to the general knowledge in this part of the world that in the months of late August and September, for example, hurricanes originate in the caribbean. Is that the degree of knowledge of this phenomenon?

THE WITNESS: To a certain degree yes. Other than that, the hurricane is a really major event.

THE COURT: I am not talking about the comparability

of the events; I am talking about the degree of public knowledge of their existence, or not public knowledge, knowledge among the—

THE WITNESS: Similar. Among the mariners, yes.

There are other months of the year where this has even more of regularity.

THE COURT: You had better stick to the ones we are dealing with.

THE WITNESS: Just May.

* * * * *

AFTERNOON SESSION
2:05 p.m.

THE COURT: We had just begun a search of the weather for the other two like [sic] ships that had gone to San Pedro.

Q. Before we broke, I believe I had asked whether you had researched the weather encountered by the two prior like [sic] ships that had entered San Pedro for cheap bunker fuel. When I say prior, I mean prior to the Nancy Lykes going to San Pedro. A. Yes, sir.

Q. What did your research show concerning those two ships which I believe, you have identified as the Dolly Turman and the Brinton Lykes? A. Yes, sir. The Dolly Turman appeared to be outbound from Balboa, Panama Canal, and went to Long Beach, and she arrived on March 22, but in order to get to Long Beach, she had to go up the Central American coast and the Mexican coast and in so doing, according to the weather charts and also an entry in the Mariner's Weather Log, this vessel encountered northerly gales, that is, winds of 45 knots and seas of 14 and a half feet with a 28 foot swell.

THE COURT: The seas were what?

Excerpts from Testimony of Robert A. Raguso

(89)THE WITNESS: Seas were 14 and a half feet and the swell was 28 feet high. On the 18th of March, at 1800 Greenwich Mean Time, in a position at 13.6 north and 94.6 west, and that falls very, very closely within the description we gave this morning about the Gulf of Tehuantepec. In fact, she had encountered the Gulf of Tehuantepec gale.

Q. How were you able to determine the exact wind and sea conditions that the Dolly Turman encountered? A. It was reported by the vessel itself, and was listed in the September, 1978 Mariner's Weather Log, which is volume No. 22, and No. 5 on page 368.

Q. Do you have that Mariner's Weather Log with you? A. I have the original, yes.

MR. CONE: Your Honor, at this point, we could offer the original for identification purposes only.

A. I can make copies of this.

THE COURT: The question is whether this fact is in issue or not.

MR. COSTELLO: Your Honor, it is irrelevant and immaterial, as far as I am concerned.

(90)THE COURT: I don't believe it is. You are free to argue that, but you are not contesting the alleged fact of this weather at this point on this day?

MR. COSTELLO: I don't know. That is his testimony. I have no way of knowing.

THE COURT: Then we might as well—

MR. CONE: Then, your Honor, I will offer the booklet in evidence.

THE COURT: All right. We will mark it now.

THE WITNESS: These are my originals.

Excerpts from Testimony of Robert A. Raguso

THE COURT: I will accept a copy and I am sure Mr. Costello will accept a copy.

MR. COSTELLO: I have no objection to the copy. I have an objection to the exhibit as being irrelevant and immaterial.

MR. CONE: That would be Plaintiff's Exhibit 8, your Honor.

THE COURT: That is what?

MR. CONE: That is the Mariner's Weather Log, volume 22, No. 5 dated September, 1978, and deals with the vessel Dolly Turman.

THE COURT: Right.

MR. COSTELLO: Now that it has been marked, your Honor, may I see it?

(91)MR. CONE: Certainly.

MR. COSTELLO: What page are you referring to?

THE WITNESS: Page 368.

Q. What weather conditions did that vessel encounter and where and when? A. She was outbound from the U.S. Gulf for the far east but went to Long Beach as well. She arrived Long Beach on March 31, 1978, and then she sailed to the far east. And later, on April 11, at 1800 Greenwich Mean Time, the vessel was at latitude 33.2 north and 161.8 east, and she reported winds west northwest 41 knots, and a swell from the west northwest at 21 feet. She was on the northeasterly trade route to Japan from Long Beach.

Q. In connection with the Brinton Lykes, how did you make those determinations? A. The reports of the vessel's weather were offered on page 369.

THE COURT: Of the same exhibit?

THE WITNESS: Of the Mariner's Weather Log, and I believe that was a November 1978 edition, if I can double check this.

No, that would be the same edition in Mr. (92) Costello's hand.

Q. So it would be in the same exhibit that we have marked as Plaintiff's 9, is that correct? A. Yes, sir.

Q. In connection with the Brinton Lykes and the Dolly Turman, would in your opinion, either of those vessels have encountered the weather that they did encounter and which you have testified to had they not been going to San Pedro or Long Beach for bunkers? A. It is my opinion that had the Dolly Turman taken a more direct and customary track toward Japan from Balboa, she would have been further offshore and in the more southerly latitudes, so that she could have avoided passing close by the Gulf of Tehuantepec. As such, she most probably would have had lesser winds and seas. Depends upon how far off the coast that track might have been, but certainly, the second vessel, the Brinton Lykes, would have been further to the south had she gone on a more direct track from Balboa toward Japan, say, by way of Honolulu.

Certainly, she would not have been up at 33 north at 161 east. She could have been at 28 or 29 north latitude, about 240 to possibly 300 miles further to the south than where she actually was had she taken (93) the more direct track by way of Honolulu.

THE COURT: In your opinion, what would have been the effect of being 240, 300 miles south?

THE WITNESS: Certainly easier on the wind. I don't think a 21 foot swell could have been avoided completely. It probably would have been somewhat lower. How much lower, I don't know at this point, but being some 300 or 240 miles further to the south, the swell would have been lower, maybe about 15 feet.

Q. In connection—

Excerpts from Testimony of Robert A. Raguso

MR. COSTELLO: Move to strike out what may be.

THE COURT: You don't mean 15 feet lower, you mean a swell.

THE WITNESS: Well, I mean a swell of 21 feet, but it is hard to say. I must be honest with you.

Q. In connection with the Nancy Lykes itself with the three locomotives lashed athwartships, you stated the vehicle should have been routed the safest possible way which would have been through the Hawaiian Islands or south? A. Could have been through Honolulu or certaintly south if a safety track—

Q. In connection with those southern routes, how far are they from the port of San Pedro? (94) A. I have to measure it. Can I measure up there?

Q. Certainly.

(Pause.)

A. The northernmost track that might be considered for this vessel is at least 600 miles to the south of the San Pedro and Long Beach area.

Q. But my question dealt with the southern tracks.

THE COURT: To Honolulu.

Q. The path that the Nancy Lykes should have taken? A. Fine.

(Pause.)

A. The southermost track is about 1,200 nautical miles south of the San Pedro, Los Angeles, Long Beach area.

Q. Are you using the same longitude when you track the mileage distance? A. Almost. I can do that, and the distance would be no appreciable change, within 50 miles of the previous distances I have given you.

Excerpts from Testimony of Robert A. Raguso

THE COURT: I assume that the Honolulu route is very close to the southernmost one in terms of (95) distance?

THE WITNESS: Yes. It is about 120 miles.

THE COURT: Difference from the southernmost?

THE WITNESS: Yes, sir.

Q. Mr. Raguso, you have testified concerning the expected or the actual, rather, weather conditions that would have been encountered had the Nancy Lykes taken the southern routes. A. Yes, sir.

Q. I would like to know what the weather conditions would have been encountered by the Nancy Lykes had she taken the northernmost route on your chart here, which is Plaintiff's Exhibit 5, in other words, the top red line. A. The top red line.

There is an exhibit that has been prepared, but I don't have it in front of me.

MS. BENZIE: That is 14-A. You have it, your Honor.

THE COURT: I am going to look at it with the witness.

THE WITNESS: That is not the one.

Q. For the record, you are referring to which exhibit now, 14? (96) A. It is Joint 14. There are two large charts. One is called Raguso 9-A. It is labeled "Available track for vessels sailing from Balboa, Panama Canal Zone bound for Japan, April, May, '78".

THE COURT: That shows the weather that you have taken from other sources, I take it?

THE WITNESS: From the weather charts, yes, sir.

A. What was the question, sir?

THE COURT: What was the weather? What would have been the weather have been should she have gone that route?

Excerpts from Testimony of Robert A. Raguso

A. The worst weather that she gets is between the third of May at let's say, 1800 Greenwich time, and the 4th of May at 12 o'clock Greenwich time, and she has northerly winds of force 5 to force 6. So the worst is force 6, both at force 6, and the sea conditions are from the north at two meters in height. That would be about 6 or 7 feet, and the swell is from the north at 3 meters in height. That would be about 10, 10 and a half feet, perhaps.

Q. In connection with the northernmost route that you have just testified to, what is the closest point in mileage on that route to the port of San Pedro? (97) In other words, how far from San Pedro—

THE COURT: We have already done that.

Q. Does that route traverse? A. About 540 nautical miles. About 540 nautical miles.

Q. So 540 nautical miles would have been as close— A. Closest.

Q. As the vessel would have come to San Pedro? A. To San Pedro, yes.

Q. Would that route have placed the vessel outside of the corridor area that you were talking about before, the area of weather problems? A. Yes, sir. It would have been south of this particular corridor by at least 300 miles or so, certainly.

Q. In connection with the Nancy Lykes itself, have you looked at the deck logs? A. I have looked at the deck logs, yes.

Q. Have you ascertained a speed of the vessel? A. Yes. We recalculated all the distances and the times from local noon to local noon, and we averaged the speeds so that we have an idea for her average speed for each of the legs, Galveston to Panama,

* * * * *

(435)Q. All right. And did you calculate a percentage based on the Mariners' Weather Logbook back to 1975? A. Yes, I have.

Excerpts from Testimony of Robert A. Raguso

Q. And where exactly is the area that you are talking about in this percentage, in terms of latitude and longitude? A. As I described earlier, we have since refined that so that we can talk only to the California coast, so we went from about 28 or 29 north latitude to the latitude of 44 or 45 north latitude, and from the immediate coastal region, and there are some indentations here, so we can use a 118 west longitude out to about 138 west longitude, and that would describe the area which defines the California coast and also incorporates a little bit of elbow room, we'll say, for impact to the California coast.

Q. And what was the final percentage figure that you came up with, taking it back to 1975? A. 7 percent.

Q. 7 percent for what? A. 7 percent incidence of gales as a function of time in each month.

(439) * * *

Q. There was some testimony last week, when you testified, that when you went up to measuring these (440) normal winds, whatever we call them, that you found the incidence to be upwards of 10 percent of the time, and yet when we got down to the San Pedro area we spoke about them being 5 to 6 percent of the time? A. That is true.

Q. Now, by using this envelope, let us say, 240 to 300 miles below San Pedro, going back almost somewhere between 480 to 500 miles up to Oregon, in that envelope, you arrive at 7 percent, is that correct? A. 7 percent, yes, sir.

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EXCERPTS FROM TESTIMONY OF RICHARD OAKES PATTERSON

(168) * * *

Q. Why would you have protested to the operations department if they ordered you to proceed with the Nancy Lykes to San Pedro? A. Basically, because of the type of deck cargo we carried. As I have mentioned before, I wasn't happy with the way it was secured, and I wouldn't be happy (169) about going

up on a northern route where I would be faced with adverse winds, adverse currents, delayed time for fueling in San Pedro, and the vessel was already about 8 days behind schedule; whereas, if I could take my own choice, leave Panama, head straight out below the Hawaiian Islands and way out over say I would say 150 degrees east longitude, and from then on up to Kobe, I would have nothing but fair winds all along the line and actually, I would be there two days faster than I could do it up by the northern route.

Q. You say that using the route south of Hawaii, you would be there some two days, at least two days quicker than using the route that the vessel actually took, is that correct? A. Yes, sir.

Q. What do you base that upon? A. On the fact that to take her bunkers in San Pedro to begin with, there is a 15 hour time delay roughly, an hour or so one way or the other. After she leaves San Pedro to Kobe, she would be running right into the worst of what we call the Koreshima, the Japanese current, which can be very strong up to 16, even more, knots a day right on the nose. Prevailing winds would be right dead ahead, whereas if we left (170) Panama, went southern of the Hawaiian Islands, we would be right in the ferrous of the trade winds and have as much as 12 to 16 knots a day pushing me along and a fair wind too. I would have the advantage as I got over the westward, of this Japanese current. I could curve up on to the north toward Kobe and carry that with me just to the last 24 or 36 hours before I would get into Japanese island areas.

Q. Hypothetically, if the operations department of Lykes Brothers were to tell you as master of the Nancy Lykes that they would save 20 or $25,000 by going to San Pedro and picking up cheap bunkers, would that savings in any way be offset by the loss of 2 or 2 and a half days in time for the voyage itself?

MR. COSTELLO: Objection, your Honor.

THE COURT: I don't know. I don't know if the objection is based on relevance. Is that what it is?

Excerpts from Testimony of Richard Oakes Patterson

MR. COSTELLO: Yes, your Honor.

THE COURT: I think since in your own brief you argue that to achieve the economy which you did achieve and was an element of reasonableness, it is perfectly appropriate for counsel to try to bring out that the economy was not as great as you hoped it would (171) be.

* * * *

(184)

Q. Captain, what did you say they would have saved if they had taken the southern route? A. I can give you an exact figure.

Q. All right, if you will. A. It would be three days and 14 hours.

Q. How did you arrive at the figure of three days and 14 hours? A. From the logbook of the Nancy Lykes. I took the exact time that they went from Galveston to Panama. That's what they actually performed.

From the departure from Panama on the route that I would have taken myself I calculated the distance up to Kobe. Then from studying the logbook I found out that the average fuel consumption in fair weather is 352 barrels per day, and on the distance and (185) the 17 knots speed plus the effect of fair current and fair wind, I calculated the number of days it would take to get to Kobe from Panama on the Southern route.

EXCERPTS FROM TESTIMONY OF RALPH LACHER

(217)

Q. And why was that decision made early in 1978? A. Well, we found that that particular area at that time had the lowest fuel oil prices we could find.

Q. And after making that decision did there come a time when a vessel from Lykes Bros. on this particular service stopped for bunkers only at San Pedro? A. Yes.

Q. And what vessel was that? A. I believe the first one was the Dolly Turman.

Excerpts From Testimony of Ralph Lacher

Q. I show you that which is called the Master's Voyage Report, Defendants' Exhibit J, previously marked, and would you kindly identify it, please.

MR. COSTELLO: May I show it to the witness, your Honor?

THE COURT: Yes.

MR. COSTELLO: I think your Honor has a copy. They originally had submitted them, but they are here, your Honor. I will be now utilizing the defendants' exhibits.

THE COURT: These are the exhibits?

MR. COSTELLO: Yes, your Honor. These are the defendants' exhibits.

THE COURT: I am sorry, What did you say (218) the title of this is?

MR. COSTELLO: This is the Master's Voyage Report.

THE COURT: All right. You want to show it to the witness?

Q. I show you the Defendants' Exhibit J and ask you do you recognize it. A. Yes, I do.

Q. And what is it? A. It's the Master's Voyage Report that is submitted to the company on completion of the voyage.

Q. And is that prepared by the master of the vessel? A. Yes, it is.

Q. And it's submitted to you, submitted to operations at the completion of each voyage? A. Yes, it is.

Q. And is that a record kept in the ordinary course of Lykes' business? A. Yes.

Q. By your department? A. Yes.

MR. COSTELLO: I offer that in evidence, your Honor.

* * * * *

(223)

Q. I show you Defendants' Exhibit F and Defendants' Ex-

hibit G and will you tell us what they are. A. F is the Brinton Lykes Master's Voyage Report.

THE COURT: Of what date?

THE WITNESS: This shows she arrived in Long Beach on March 31 and also sailed on the same date, and she arrived from, yes, New Orleans, and she sailed to Kobe after that, took on 10,000 barrels of fuel at Long Beach.

Q. And then I gave you another exhibit there, Will you tell us what that is. Withdrawn.

Before I do that, that's also a record similar to the other Master's Voyage Report, correct? A. Yes, it is.

Q. What voyage is this for the Brinton Lykes? A. This is Brinton Lykes voyage 68.

MR. COSTELLO: I offer that in evidence, your Honor.

THE COURT: All right. Received.

A. This Exhibit G—

MR. COSTELLO: Just a moment.

(Defendants' Exhibit F was received in

(240) * * *

Q. If you had heavy deck cargo, would your job as a line supervisor differ in what recommendation you (241) were going to make as to bunkering? A. No.

Q. There'd be no difference? A. No.

Q. In other words, if you had—take the case in question, the Nancy Lykes is leaving the Gulf with these three GE locomotives on its deck, athwartship on a hatch cover that's no more than 25 feet wide and the locomotives are 50 some-odd feet each. First of all, are you aware of how they were lashed? A. No, I wasn't.

Excerpts From Testimony of Ralph Lacher

Q. Are you made aware of how they were lashed by anybody?

THE COURT: As a matter of practice is he made aware, you mean?

MR. CONE: Right.

THE WITNESS: No.

Q. So you are not aware of how they are lashed, is that correct? A. No.

Q. Are you aware of how they are stowed, fore, aft, or athwartship? A. Yes.

(242)

Q. How are you made aware of that? A. By, you know, receiving the stowage and passing it on to the other ports, we would know it.

THE COURT: The same way as you are made aware of other stowage, right?

THE WITNESS: Yes.

Q. Are you aware of whether the locomotives were chocked? A. No.

Q. Are you aware of any possible carpentry work that might have been done in securing the locomotives? A. No, because that's actually done through the stevedores, and you know, ship's officers, what lashing and chocking they should do on a ship.

Q. So basically what you are aware of is that, with the Nancy Lykes anyway, that you had three locomotives on deck stowed athwartships; is that correct? A. Correct.

Q. And of course you are aware of any other deck cargo; is that correct? A. Yes.

Q. And you then at some point in time made a decision to send the vessel to San Pedro for cheap (243) bunker fuel; is that correct? A. Yes.

Excerpts From Testimony of Ralph Lacher

Q. Was that decision made prior to your having been aware that it had three locomotives athwartship on its deck? A. I don't know.

Q. Do you have any notes or anything that would indicate when you made this decision? A. No.

Q. Did you yourself make the decision, or did you make it in connection with your supervisor, Mr. Bulloch? A. We made it in connection with my supervisor.

Q. Do you know or do you recall what prompted you to make this decision to go to San Pedro? A. For the cost savings of the fuel involved.

Q. Who advised you that there were savings in bunker fuel at San Pedro? A. We keep track of all the fuel prices from the major oil companies, what the prices are at any given time.

* * * *

(246)

Q. So what about these other ports that you stopped at for bunker fuel? Could they possibly have been advertised by Central Gulf? A. Possibly.

Q. San Pedro was not advertised by Lykes on that particular outbound voyage that we are talking about, correct? A. Correct.

Q. Why? A. Because I think it's a normal practice just to advertise your ports of loading and discharge.

Q. You mean cargo ports, is that it? A. Cargo ports, yes.

Q. What other ports did Lykes have aside from the port of San Pedro that it stopped at in 1978 to acquire cheap bunker fuel, that were not cargo ports? A. That's the only one I can recall.

Q. It's the only port? A. Yes.

Q. What ports did you have before 1978 that you (247) stopped at to acquire cheap bunker fuel that were not cargo ports of call? A. I don't know of any.

Q. You don't know of any? A. No.

Excerpts From Testimony of Ralph Lacher

Q. So how do you come up with the custom that it was customary not to advertise San Pedro? What do you base that on?

MR. COSTELLO: Objection, your Honor.

Q. That statement that it was customary.

MR. COSTELLO: Objection, your Honor.
THE COURT: Overruled.
MR. CONE: Your Honor, it's relevant.
THE COURT: I said overruled.
MR. CONE: Thank you.

A. I just think it's—I don't know why—I don't see any reason why somebody would advertise a bunker port.
Q. What about cargo interests?

THE COURT: Let me ask you, does Lykes now in the light of this suit advertise bunker calls?
THE WITNESS: I don't think so. I don't know.

Q. Do you have any ports today—
(248)

THE COURT: What can you lose by doing so? Are you afraid you will scare off business?
THE WITNESS: I don't know if they—I don't get involved in the—I don't get involved in the advertising end of it; but I don't see why they shouldn't.
THE COURT: Maybe I shouldn't ask you.

Q. Your answer was you don't see why they shouldn't advertise? Is that what you just said? A. Yes.
Q. We have had—have you been here through the trial up to date here? A. Just today.
Q. Just today? A. Yes.

Excerpts From Testimony of Ralph Lacher

Q. We have had testimony to the effect that one of the important considerations for a liner service is to try to maintain their schedule or stay as closely as possible to their advertised schedule. Would you agree with that? A. Yes.

Q. Were you aware that the vessel could have saved time, the Nancy Lykes, if it had taken the southern broken line route south of Honolulu? I am (249) referring to plaintiff's exhibit 5.

MR. COSTELLO: I will object to this line of questioning, your Honor. This is not proper cross examination. This was not gone into during the direct examination.

MR. CONE: Your Honor, it goes to the thought processes.

THE COURT: He can make the witness his own for this purpose, but I think all you need was the admission, if you want to call it an admission, agreement that—

Q. I would just like to know what went into your mind, what considerations you took when you decided to make San Pedro a bunker stop for the Nancy Lykes.

THE COURT: If you want to ask whether—

Q. Were you aware that you could have shortened the voyage time-wise by taking a route south of Hawaii? Were you aware of that?

MR. COSTELLO: Objection, your Honor.

THE COURT: Overruled.

A. No, because I wasn't aware of any weather involved, any predicted weather.

Q. Were you aware or was anybody working with (250) you aware, anybody who made this decision, was involved in this decision to send the Nancy Lykes to San Pedro, were any

of you aware that you could have saved time by taking a southerly route, the route south of—

THE COURT: He can't testify what other people were aware of unless they told him they were aware of it.

MR. CONE: I am talking from his experience, your Honor, in working with these people.

MR. COSTELLO: Objection, your Honor.

Q. Were you aware? You weren't aware; is that correct? A. No.

Q. Were you aware of weather problems on possible routes that you selected, potential weather problems? A. I guess any route has potential weather problems.

THE COURT: Were you aware of a phenomenon that has been testified to here as a chinook winds or—

Q. Santa Ana wind off the California coast?

THE COURT: Coming through the area of San Pedro with a certain degree of regularity?

THE WITNESS: No, I wasn't.

(251)Q. Just as a point of curiosity, why didn't you have all your ships outbound from the Gulf in early part of 1978 stop at San Pedro on the way to the Far East? Why just three ships? A. It probably was the prices at the time.

Q. Wasn't it a fact that San Pedro became cheap in January of 1978? A. I don't know. I don't have my records here right now.

Q. How many ships did you have leave the Gulf for the Far East between January and May of 1978? A. I don't know.

Q. Could you give us a ball park figure? Would it be ten ships? A. Between January and May?

Q. Yes. A. I think we used to run maybe—

Excerpts From Testimony of Ralph Lacher

THE COURT: Again, Mr. Cone, I don't know what further you are trying to prove. The witness—

MR. CONE: I am just trying to prove, your Honor, that it was not something that they were doing with any degree of regularity at that time at all, and the only reason I am going into that, and I want to go into subsequent periods of time, is because, your Honor, * * *

* * * * *

(254)Q. And you have also stated that San Pedro was the only port of call other than the regularly scheduled port where you went out of your way to get cheap bunker fuel; is that correct? A. Yes.

Q. Why didn't you go to other ports? I mean Montreal right now is considered the cheapest bunker fuel port in the world.

MR. COSTELLO: Objection, your Honor.

Q. Why wouldn't you go to other ports other than San Pedro?

MR. COSTELLO: Objection.

THE COURT: I will sustain the objection. It seems to me we are just belaboring an issue here. Your major point is that they went out of their way to save money, and the defendant said, "Yes, I did." I don't know what more one can prove. This was a decision based on your desire to save money, wasn't it?

THE WITNESS: Yes.

MR. CONE: Your Honor, I have no further questions.

* * * * *

EXCERPTS FROM TESTIMONY OF WILLIAM KACIAK

(270)Q. Now, particularly going back to the Nancy Lykes, did there come a time when you received a request to suggest a weather routing for this vessel from San Pedro to Kobe, Japan? A. We received a request from the master for weather routing I think it was around two days before he was scheduled to sail.

THE COURT: This is trip 63 we are talking about?
MR. COSTELLO: Trip 63, yes.

A. I think it was approximately two days before that he requested weather routing from us, that we provide it, gave us his estimated time of departure from San Pedro.

THE COURT: Excuse me. Two days before he was to sail from where, Galveston?
THE WITNESS: No, from San Pedro.

Q. There was no request to weather route him through the Gulf or from the Gulf up to San Pedro, was there? A. There was no request there.

Q. Is that unusual? A. No, that's not unusual. The only time we get requests to route them from the Gulf to Panama and

* * * * *

(273) * * *

Q. There was reference to the Dolly Turman, I believe, in March 17, 1978, of experiencing the Tehuantepec winds or off the Gulf of Tehuantepec on March 17.

(274)Now, does one find in March that you can expect them? A. Well, in March, according to the book of climatology—would you like the reference?

THE COURT: Yes.

A. I used the Climatological and Oceanographic Atlas, and it was compiled by the United States Weather Bureau and by the

United States Hydrographic Office. So this is an atlas prepared by them.

In that particular atlas they do have measurements right in the Gulf of Tehuantepec and they give the frequency of occurrences of different wind intensities, and from that particular table I found that in March there is a 4 percent chance of having a Tehuantepecer of force equal to or greater than force 7, there is a 1 percent chance—

THE COURT: Force 7 is gale?

THE WITNESS: Not quite. It's near gale. So it's a lower limit. Gales start at 34 knots. It's force 8, usually, gale.

THE COURT: All right.

A. So force 7, there is a 4 percent chance of a force 7 or greater wind in March, force 8 or greater, which is gale, there is only a 1 percent probability.

* * * * *

(303) * * *

THE COURT: May I ask you a sea [sic] sequential: Bearing in mind the circumstances which existed at the time that this trip actually occurred, would you have recommended a route that—I guess you did recommend a route that was outside this so-called envelope?

THE WITNESS: No, no I have him from San Pedro. I had nothing to do with lower California.

THE COURT: Would you have a recommended a route like that?

(304)THE WITNESS: The odds are I definitely would have been well north of—I would not have selected any of these southern routes. I would have rejected those.

Q. Why? A. In our initial forcast we had predicted there would be storms in this area.

Q. What area is that we are talking about? A. Just a little

bit north of Hawaii. They are called Kona lows. Subtropical lows were forming in that particular area. With the very strong high north of Japan the worst weather would have existed, if that type of system we are assisted, the worst weather would have persisted in the more southerly latitudes. You would have had the greatest swells and rolling. The odds are it could have been very close to this northern envelope or possibly—it could have—I think that I might have recommended it might have been close to this northern envelope. We would have kept him south of the northerlies initially and then brought him up north very similarly to what we routed the vessel in the latter part of the crossing.

* * * * *

(321) * * *

Q. You said that you recommended that the (322) vessel or you thought to yourself I can't recommend the vessel goes south because of the rolling problem; is that correct? A. In my original forecast I had the bad weather shifting south, so if I sent them south, it would be in the weather longer. I think the quickest way out of the area and to minimize the exposure to weather was on the northerly route. That is the reason why we sent them northerly. The southerly was rejected not just because of the rolling. That was one of the major considerations but also that the weather would be worse there for a longer period of time.

Q. You have testified that if you were routing this ship you'd route it some place inside this red marked envelope on Plaintiff's Exhibit 35. If you had been asked to route it from the Panama Canal Zone. A. Not quite. I said I might come very close to the northern envelope and might not be inside, might be very close to it probably.

Q. And you also said before that taking this northern route would avoid the northerlies. A. That particular one—

Q. What did you mean by the northerlies? A. I meant this coastal. By being—I think I (323) modified that on the en-

velope. I said I might have them further south in the easterly part of the pacific to avoid the northerlies. Northerlies I mean the stuff that was happening off the California coast and these swells had traveled quite far south, so it would have been necessary to possibly be further south in this area can't of the in the easterly part of the ocean.

Q. What creates or what causes the northerlies? A. It's basically a gradient between a high pressure still off the Pacific coast and low pressure inland, and so there is a gradient between the two, the flow around a high.

Q. Clockwise? A. The flow about a high is clockwise, about a low counterclockwise, and the combination of the two, it's the differential and pressure between a high pressure and a low pressure creates a new gradient.

Q. Isn't it a fact that in the springtime months lows form with great frequency? Isn't that a fact? A. It's nearly permanent, yes, with great frequency, yes.

* * * * *

Office Supreme Court, U.S.
FILED
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CLERK

No. 83-94

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

S.S. "NANCY LYKES", her engines, boilers, etc., and LYKES BROS. STEAMSHIP COMPANY, INC.,
Petitioner,

—against—

GENERAL ELECTRIC COMPANY, INTERNATIONAL SALES DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF LYKES BROS. STEAMSHIP COMPANY, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. RESPONDENT FAILED TO RECOGNIZE THAT THE COURTS BELOW FOUND COGSA APPLIED IN THIS CASE AND IN SO DOING FAILED TO EXPLAIN WHY THE CLEAR LANGUAGE OF THE STATUTE SHOULD NOT BE FOLLOWED AS IT WAS IN A SEVENTH CIRCUIT CASE ON THIS ISSUE THUS THERE IS A CONFLICT BETWEEN THE CIRCUITS WHICH SHOULD BE RESOLVED BY THIS COURT 1

II. RESPONDENT'S TRIVIAL ATTACKS ON PETITIONER'S STATEMENT OF THE CASE ARE NOTHING MORE THAN A PURPOSEFUL DISTRACTION FROM PETITIONER'S URGING THAT THIS COURT ESTABLISH GUIDELINES FOR THE DETERMINATION OF AN UNREASONABLE GEOGRAPHICAL DEVIATION UNDER COGSA 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases PAGE

Atlantic Mutual Insurance Company v. *Poseidon Schiffahrt, G.m.b.H.*, 313 F.2d 872 (7 Cir.), *cert. denied*, 375 U.S. 819 (1963) 1, 2, 3, 9

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 3

Iligan Integrated Steel Mills, et al. v. *S.S. JOHN WEYERHAUSER, etc., et al.*, 507 F.2d 68 (2 Cir. 1974), *cert. denied*, 421 U.S. 965 (1975) 4, 5

Packard Motor Co. v. *NLRB*, 330 U.S. 485 (1947) 3

Sinclair Refining Company v. *Atkinson*, 370 U.S. 195 (1962) 3

United States v. *Oregon*, 366 U.S. 643 (1961) 3

Statutes

Carriage of Goods by Sea Act (COGSA):

46 U.S.C. § 1300 1

46 U.S.C. § 1301(c) 2

46 U.S.C. § 1304(4) 1

46 U.S.C. § 1304(5) 1, 3, 4, 5

46 U.S.C. § 1305 5

46 U.S.C. §§ 181, 183-189, §§ 190-194 5

Other Authorities

Knauth, *Ocean Bills of Lading*, 241 (4th Ed. 1953) 2

ARGUMENT

I

RESPONDENT FAILED TO RECOGNIZE THAT THE COURTS BELOW FOUND COGSA APPLIED IN THIS CASE AND IN SO DOING FAILED TO EXPLAIN WHY THE CLEAR LANGUAGE OF THE STATUTE SHOULD NOT BE FOLLOWED AS IT WAS IN A SEVENTH CIRCUIT CASE ON THIS ISSUE THUS THERE IS A CONFLICT BETWEEN THE CIRCUITS WHICH SHOULD BE RESOLVED BY THIS COURT.

Respondent's tired contention that no conflict exists between the circuits with respect to the applicability of the package limitation following the finding of an unreasonable geographical deviation, is without merit. The Seventh Circuit in *Atlantic Mutual Insurance Company* v. *Poseidon Schiffahrt, G.m.b.H.*, 313 F.2d 872 (7 Cir.), *cert. den.* 375 U.S. 819 (1963) held the package limitation applicable; the Second Circuit in the matter at bar held to the contrary.

The Seventh Circuit specifically based its decision on the express, clear "in any event" and "any loss or damage" language in section 1304(5) P. Br. D-7) of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* (1936) (hereinafter "COGSA") and because of the fact that the package limitation provision follows hard on the heels of section 1304(4) (P. Br. D-6), the deviation provision of the statute. It concluded that COGSA changed the pre-existing legal effect of a finding of an unreasonable deviation whereby the liability of the carrier became that of an insurer and held that a carrier has the right to the package limitation "in any event", *Atlantic Mutual, supra.*, at 874-875.

The Second Circuit ignored the "in any event" and "any loss or damage" language of § 1304(5) (P. Br. D-7) and held only that an unreasonable deviation deprives the carrier of the

COGSA package limitation (P. Br. A-17).* This is the conflict between the circuits.

That in *Atlantic Mutual, supra*, COGSA applied by its own force and effect and in the case at bar it applied as a matter of agreement between the parties, does not erase the diametrically opposed holdings of the two circuits with respect to whether COGSA changed the law. In both cases COGSA applied, albeit via different vehicles.[1] Where COGSA is applicable by its own force and effect, the law simply injects COGSA into the contract of carriage between the parties. Where COGSA does not automatically apply [46 U.S.C. § 1301(c)] the parties can make it applicable, as the court below found to be the case in the matter at bar (P. Br. A-15 n.7).

The implication of respondent's argument is, that, resolution of the sharp conflict between the two circuits depends upon the vehicle by which COGSA is made to apply. What respondent ignores is, that, the court below did not attach any legal significance to the distinction. And, in fact, according to the court below, the issue was: Whether an unreasonable deviation deprives the carrier of the benefit of the § 1304(5) liability limitation (P. Br. A-16). This was the identical issue before the Seventh Circuit in *Atlantic Mutual, supra*.[2] More-

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* All reference to "P.Br." are to petitioner's, Lykes Bros., brief and "R.Br." are to respondent's, General Electric brief. P.Br. followed by a letter (A,B,C,D and E) refers to the appendixes included in petitioner's brief with the appropriate reference to the pages in the particular appendix following the letter. All references to "R.App." appendix following the letter are to respondent's appendix.

1 The 1953 comment by Knauth, in *Ocean Bills of Lading*, 241 (4th Ed. 1953) cited in a footnote by respondent (R.Br. at 8n.2) is outdated. The *Atlantic Mutual* case *supra*. was decided ten years *after* the book was published. Moreover, the author in the sentence immediately preceding the quoted material states: "The cases are not particularly satisfactory."

2 Respondent's irrelevant speculation that the seventh circuit "would agree" that COGSA is ousted when it applies as a matter of contract, as here, stems from the dictum of the district court quoted in the Seventh Circuit opinion. The fact of the matter is that the issue was not before the Seventh

over, in this context, the court below made no attempt to distinguish the *Atlantic Mutual* case, *supra*, notwithstanding that it was clearly aware that the holding there was contra to its own as the "But see" reference to the *Atlantic Mutual* case *supra.*, in the lower court's opinion, makes clear (P. Br. A-16).

A reading of the court's opinion below establishes that its holding had nothing to do with the fact that in this case COGSA was not applicable by its own force. The Second Circuit held the way it did because it views deviations to be so serious a breach of the contract of carriage that "the carrier must be deprived of the protection of the § 4(5) liability limitation [P. Br. A-17]". By making what can only be characterized as a policy determination, the court below invaded the province of the legislature and read out of COGSA the "in any event" language of § 1304(5). In so doing, the lower court resolved an issue of federal law in a manner in conflict with the teachings of this Court.

As this Court stated in interpreting the Norris-LaGuardia Act, in *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195, 202-3 (1962):

> Moreover, the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself. We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeatedly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction [footnotes omitted].

See, also *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961), *Packard Motor Co.* v. *NLRB*, 330 U.S. 485, 492 (1947).

Circuit. However, in the instant case, the issue was raised below and neither the district nor the circuit court held that COGSA was ousted.

The Second Circuit's decision also lacks logical consistency. The real issue is why should an unreasonable geographical deviation be treated different from any other breach. On the one hand the court below characterizes the failure on the part of a carrier to exercise due diligence to make a vessel seaworthy, i.e. the sending of an unseaworthy vessel, her cargo and personnel out to sea, as an "ordinary risk of shipping [P. Br. A-17]". But can it seriously be denied that such conduct is, at least, as "serious" and "fundamental" a breach of the carrier's undertaking as an unreasonable deviation (P. Br. A-17)? Yet, the carrier's failure to exercise due diligence to make the vessel seaworthy does not deprive it of the package limitation, *Iligan Integrated Steel Mills, et al.* v. *S.S. JOHN WEYERHAUSER*, etc., *et al.*, 507 F.2d 68 (2 Cir. 1974) *cert. denied*, 421 U.S. 965 (1975).

It is invalid to reason, as to the lower court did (P. Br. A-17), that an unreasonable geographical deviation exposes cargo to "unanticipated risks [P. Br. A-17]" An insured risk, on its face, is not an unanticipated risk (see discussion in P. Br. at 17). In the case of an uninsured cargo interest, it assumes the risk that the package limitation will apply as in the case of a loss occurring because of the carrier's failure to exercise "due diligence" to make a vessel seaworthy.

Respondent enumerates contrived considerations to justify ignoring the clear "in any event" language of § 1304(5) (P. Br. D-7). In so doing respondent, in essence, attacks every limitation of liability statute since by their nature such statutes are arbitrary. What respondent ignores is the fact that the Second Circuit's refusal to oust the package limitation following a finding of a carrier's failure to exercise "due diligence" to make a vessel seaworthy (*Iligan Integrated Steel Mills, supra*) confirms its recognition that limitation statutes are valid statements of public policy.

Noteworthy too, is the fact that the COGSA limitation of liability provision is not as arbitrary as it appears at first blush. It applies only in the case of goods shipped in packages or

customary freight units. Furthermore, the shipper can avoid limitation entirely by declaring the full value of the cargo.[3]

Most significantly however, the lower court's failure to recognize that COGSA worked a change in the pre-existing law is based upon a rationale that no longer exists. A loss following an unreasonable deviation no longer results in the denial of a cargo interest's insurance cover, a fact demonstrated by this case (see discussion in P. Br. at 16-20). If respondent did not make a full recovery from its cargo underwriter, as argued, it is only because respondent underinsured the shipment. Moreover, respondent also failed to declare the value of the shipment, an option that is available under COGSA § 1304(5) to carriers whether they be fully insured, partially insured or uninsured (P. Br. D-7).[4]

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3 General Electric inexplicably argues that by deviating, Lykes "chose under COGSA's sections 1304(5) and 1305 to increase its liabilities and responsibilities [R. Br. at 9]." Under 1304(5) (P. Br. D-7), a maximum amount of liability other than the one mentioned, may be fixed by agreement between the carrier, master or agent of the carrier and the shipper (P. App. D-7). No such agreement existed in the matter at bar. Under § 1305 (P. Br. D-8), a carrier may increase its liabilities "provided such surrender or increase shall be embodied in the bill of lading issued to the shipper [P. App. D-8]." There is no such writing in the bill of lading in this case.

4 Respondent's citation to the Harter Act and Limitation of Liability Act provisions, 46 U.S.C. §§ 181, 183-189, §§ 190 to 194 is misplaced. The Harter Act contains no package limitation provision, no option to declare a higher value on the part of the shipper and no "in any event" language. The Limitation of Liability Act provisions are dependent upon the absence of a finding of privity or knowledge on the part of an owner with respect to the cause of the loss, damage, injury or death. The COGSA package limitation provision, by its very terms, is available to the shipowner regardless of "privity or knowledge" such as in the case where the shipowner fails to exercise due diligence to make the vessel seaworthy, *Illigan Integrated Steel Mills, supra*.

II

RESPONDENT'S TRIVIAL ATTACKS ON PETITIONER'S STATEMENT OF THE CASE ARE NOTHING MORE THAN A PURPOSEFUL DISTRACTION FROM PETITIONER'S URGING THAT THIS COURT ESTABLISH GUIDELINES FOR THE DETERMINATION OF AN UNREASONABLE GEOGRAPHICAL DEVIATION UNDER COGSA

General Electric's taking issue with petitioner's presentation of the "Statement of the Case" is best resolved by referring to the citations to the record included in the appendices. However, certain accusations of "inaccuracies", "omissions" and "misstatements" on the part of Lykes (R. Br. at 1) deserve more specific consideration.

As much as respondent would like the record to read differently (R. Br. at 1), it indicates that General Electric's own witness testified that respondent's agent prepared the bill of lading. Moreover, the witness testified that it was "customary" for Lykes to supply the appropriate form and that Lykes had carried many of some earlier forty odd units that had been shipped (P. Br. E-18). Respondent conveniently omitted from its appendix (R. App. at 2a-4a) page 19 of the witness' testimony, relied upon and cited by petitioner in support of its contention that respondent had notice of the clauses contained in the bill of lading, including the clause permitting the vessel to call at any port for fuel oil (bunkering).

After bunkering, the NANCY LYKES departed from San Pedro bound for Japan on a modified great circle course. What respondent overlooks (R. Br. at 2) is that the weather expert who testified on its behalf at trial characterized the actual track of the vessel as appearing to be a great circle route.

> That appears to be a great circle route or a combination of a great circle to a junction point mid ocean, but it is

> certainly a great circle or very close to it, sir [trial transcript at 99].

Moreover, every layman knows that a great circle is the shortest distance between two points on the globe. In fact, an inspection of an exhibit introduced into evidence at trial by respondent, the pilot chart of the North Pacific Ocean for the period April 1978, depicts the shortest route from Panama to Japan, which passes close to the California coast (P. Br. E-25).

In addition, a second witness who testified on behalf of respondent at trial, stated that he had extracted several Panama Canal to Kobe routes from a governmental publication, entitled "Table of Distances Between Ports" to prepare an exhibit which respondent introduced at trial. It lists, among other things, the distance from the Panama Canal to Kobe on a great circle route and then a combination coastal and great circle route via Los Angeles (P. Br. E-6) (San Pedro is the port for Los Angeles).

In light of the information appearing in respondent's own exhibits and given the testimony of its own witnesses, can it be denied that the great circle route satisfies the lower court's definition of "customary", i.e., "established and by all means published to the world [P. Br. A-11]?"

Respondent's belated attempt to discredit its own exhibit, the April 1978 Pilot Chart for the North Pacific Ocean, (P. Br. E-25) obviously because it supports petitioner's contention that at most there was only a one or two percent greater chance of encountering adverse weather on the actual route (P. Br. at 516) is particularly illuminating (R. Br. at 4). It states under "average conditions of wind and weather over the North Pacific Ocean during April":

> *Gales*—Gales have slackened considerably by April. A maximum frequency of 8-13 percent occurs along the Aleutian Islands from Umak Island to Southern Kamchatka. Just west of midocean this area of gales dips just southward to the latitude of Yokohama and just south of

> the Alaska Peninsula is a small area where gales occur 8 percent of the time. *South of 35°N gales are not encountered more than 4 percent of the time.* [P. Br. E-25, emphasis added].

Thus, contrary to respondent's contention, the pilot chart specifically delineates the areas of the Pacific Ocean that are involved with respect to the statistical probability of encountering gale force winds.

Furthermore, the information appearing on the pilot chart is anything but "out-dated", as respondent would have this Court believe. It incorporates updated information that is presented to the Defense Mapping Agency Hydrographic Center which in turn publishes the chart. As indicated in the notes appearing on the chart, it is also prepared from data furnished by the United States Naval Oceanographic Office and Environmental Data and Information Service, National Oceanic and Atmospheric Administration (P. Br. E-25). In fact, the reliability of the pilot chart is further confirmed by the respondent's weather expert at trial. He testified: "It is a commonly used chart both to the mariner aboard the vessel and to the voyage planning people as well as to the shiprouter" and that "I would have used it, yes [trial transcript at 65, 66]"[5]

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5 The remaining alleged inaccuracies, omissions and misstatements are likewise without foundation. In this same context, it is interesting to note that the party taking liberties with the record is General Electric. For example, and in addition to those instances referred to above, a reading of the portion of the chief mate's testimony cited by respondent (R. Br. at 1a) does not support its statement in connection therewith (R. Br. at 3). Similarly, despite respondent's statement at R. Br. 10, there is nothing in the record in connection with deviation insurance on the part of carriers.

CONCLUSION

Respondent cites to five cases where certiorari was denied, allegedly in similar matters involving the same issues. Only one of the five, *Atlantic Mutual Insurance Company* v. *Poseidon Schiffahrt*, 313 F.2d 872 (7th Cir.), *cert. denied* 375 U.S. 819 (1963), involved the same issue herein presented, and it was correctly decided, as discussed above. Of the remaining four, two involved so called quasi-deviation issues, i.e., where cargo is carried on deck despite a promise to carry it underdeck and thus a unique type of near fraud, and the other two are pre-COGSA cases. Moreover, the finding of an unreasonable deviation in the circumstances of this case is an unfair decision inflicting a harsh blow on the shipping industry and particularly on one of the few remaining American flag operators. For all of the foregoing reasons this case stands as a perfect candidate for the granting of review by this Court and it is respectfully urged that the petition for a writ of certiorari be granted.

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Respectfully submitted,

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